Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

DENNIS STRAUB, WARDEN,

Petitioner

vs.

CORTEZ MILLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

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I. Neither the United States Supreme Court nor any federal circuit has held that a lack of advice of collateral consequences of a guilty plea renders the plea involuntary. The Sixth Circuit in this case held that counsel was ineffective, not for any misadvice, but for "failing" to advise the respondent that the State could appeal the trial judge's decision whether to sentence him as a juvenile or an adult. Does this ruling constitute a "new rule" under the AEDPA, not applicable on habeas corpus; in the alternative, is the state court holding that defendant was not deprived of effective assistance an objectively unreasonable application of *Hill v. Lockhart*[1] and *Strickland v. Washington*?[2]

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[1] *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

[2] *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

II. The question left open by this Court's Opinion in *Williams v. Taylor*[3] is whether a state-court decision, purporting to dispose of a federal challenge on the merits but failing to articulate any reasoning or controlling federal authority, is an "adjudication" falling under the AEDPA § 2254 deferential standard of review. Should this Court address this issue inasmuch as it has led to conflicting opinions in the circuits and because the answer to the question would be outcome-determinative in this case?

III. To grant habeas corpus relief, the state court decision must have been either contrary to or an unreasonable application of settled federal constitutional principle as determined by this Court. An unreasonable application is not simply one that is erroneous or incorrect. Given the rejection of the "any rational jurist" test by this Court, should certiorari be granted to give further guidance, so that federal courts do not simply conclude that because they disagree with the state courts the state court decision was therefore unreasonable?

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[3] *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

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Now Comes the State of Michigan, by **Michael E. Duggan**, Prosecuting Attorney for the for the County of Wayne, **Timothy A. Baughman**, Chief of Research, Training, and Appeals, and **Thomas M. Chambers**, Assistant Prosecuting Attorney, Appeals, and prays that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals of the United States of America, entered in this case on August 8, 2002.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals is reported at 221 Mich. App. 551, 562 N.W.2d 241 (1997) (*People v. Haynes, et. al.*), and is attached as an appendix. The Order of the Michigan Supreme Court denying leave to appeal is reported at 456 Mich. 941, 575 N.W.2d 561 (1998). The Opinion of the District Court is attached. The Opinion of the Sixth Circuit affirming the District Court is reported at 299 F.3d 570 (6th Cir. 2002), and is attached as an appendix. Finally, the Order denying the Petition for Rehearing En Banc, dated October 2, 2002, is attached as an appendix.

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals issued its Opinion on August 8, 2002. That Court then issued an Order denying a Petition for Rehearing En Banc on October 2, 2002.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

Respondent, date of birth: 4/4/74, was charged in a criminal Information in the Detroit Recorder's Court with the offenses of first-degree murder, Michigan Compiled Laws (M.C.L.)750.316; Michigan Statutes Annotated (M.S.A.) 28.548, assault with intent to rob while armed, M.C.L. 750.89; M.S.A 28.284, and felony-firearm, M.C.L 750.227b; M.S.A. 28.424(2); all of these charges arose out of an attempting carjacking incident, which resulted in the death of Benjamin Gravel.

On March 23, 1990, Respondent pled guilty to the offenses with which he was charged. Because Respondent was under the age of 17 at the time of the commission of the charged offenses, the trial court, that being the Honorable Dalton A. Roberson, set the matter for a juvenile sentencing dispositional hearing, as required by M.C.L. 769.1(3); MSA 28.1072(3); Michigan Court Rule (M.C.R.) 6.931.

Following the above sentencing hearing, which encompassed some six (6) days, Judge Roberson issued a written Opinion and Order sentencing Respondent to juvenile probation and ordering that "he be committed to the custody of the Michigan Department of Social Services for confinement in a proper institution until he reaches the age of 21 years."

The Wayne County Prosecutor appealed by right Judge Roberson's decision to sentence Respondent as a juvenile to the Michigan Court of Appeals. On May 17, 1993, the Court of Appeals rendered a published Opinion (with Murphy, J., concurring in part and dissenting in part) reversing Judge Roberson's sentencing decision and remanding the matter to the trial court for the imposition of an adult sentence. *People v. Miller*, 199 Mich.App. 609, 503 N.W.2d 89 (1993), lv. denied, 445 Mich. 855-856 (1994).

On August 13, 1993, Respondent's Motion for Rehearing was denied.

Respondent then applied for leave to appeal from the Michigan Supreme Court. On April 8, 1994, the Supreme Court denied Respondent's Application for Leave to Appeal. *People v. Miller,* 445 Mich. 885-886 (1994).

The matter returned to the trial court for the imposition of an adult sentence consistent with the Michigan Court of Appeals' Opinion of May 17, 1993.

Meanwhile, on July 1, 1994, Respondent filed a Motion to Withdraw his Guilty Plea and for an Evidentiary Hearing with the trial court. On September 14, 1994, Judge Roberson issued an Order ordering that there be an evidentiary hearing on Respondent's Motion to Withdraw his Guilty Plea.

On September 26, 1994, the Wayne County Prosecutor filed with the Michigan Court of Appeals and then with the Michigan Supreme Court an Application for Leave to Interlocutorily Appeal Judge Roberson's Order of September 14, 1994.

On December 7, 1994, the Michigan Supreme Court issued an Order vacating the trial court's Order of September 14, 1994 directing that there be an evidentiary hearing on Respondent's Motion to Withdraw Guilty Plea. In the same Order, the Supreme Court directed that Respondent "be sentenced as an adult forthwith, as directed by the Court of Appeals [Opinion appearing at 199 Mich. App. 609 (1993)] without prejudice to subsequent consideration of the motion to withdraw the plea of guilty or motions for other relief which the defendant might pursue." *People v. Miller,* 447 Mich 970 (1994).

Judge Roberson did then, on December 19, 1994, sentence Respondent as an adult, to life imprisonment without possibility of parole, pursuant to M.C.L. 750.316. Subsequently, a date was then set for evidentiary hearing on Respondent's Motion to Withdraw Guilty Plea.

On May 4, 1995, an evidentiary hearing was conducted.

On October 23, 1995, the trial court entered an Opinion and Order granting Respondent's Motion to Withdraw Guilty Plea.

On November 9, 1995, the Wayne County Prosecutor filed with the Michigan Court of Appeals an Application for Leave to Appeal the trial court's Opinion and Order of October 24, 1995; on February 6, 1996, the Michigan Court of Appeals granted the Wayne County Prosecutor's Application for Leave to Appeal.

On February 14, 1997, the Michigan Court of Appeals issued a published Opinion reversing the trial court's Order granting Respondent's Motion to Withdraw his Guilty Plea and affirming Respondent's conviction and sentence. *People v. Haynes et. al.*, 221 Mich. App. 551, 562 N.W.2d 241 (1997).

Thereafter, Respondent sought leave from the Michigan Supreme Court to appeal the Court of Appeals' Opinion; on March 6, 1998, the Supreme Court denied leave to appeal. *People v. Miller,* 456 Mich. 941, 575 N.W.2d 561 (1998).

On October 27, 1998, Respondent filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan, Southern Division.

On August 31, 2000, the District Court issued an Opinion and Order granting the Petition for Writ of Habeas Corpus, and a Judgment in favor of Respondent.

On August 8, 2002, the Sixth Circuit Court of Appeals issued an Opinion, with Judge Gilman concurring and Judge Boggs dissenting, affirming the District Court. On October 2, 2002, that Court denied the Petition for Rehearing En Banc.

Petitioner seeks certiorari.

Statement of Facts

Respondent, Cortez Miller, born April 4, 1974, was involved in the shooting death of Benjamin Gravel on February 8, 1990. Respondent, along with five other young men, spent that evening attempting to steal a car at gunpoint because they wanted a car to go to a party. Respondent was charged with first-degree murder, assault with intent to rob while armed, and possession of a firearm during the commission of a felony.

The matter was in court on March 23, 1990, and the following occurred:

> MR. LUSBY [Defense Counsel]: Your Honor, Mr. Miller would like to withdraw his plea of not guilty to murder in the first degree felony murder, assault with intent to rob being armed and felony firearm and tender a plea of guilty to those charges. There have not been any agreements made with the prosecution. Mr. Hart has said that their Office is going to recommend that Mr. Miller be sentenced as an adult. We have not agreed to that. That is his recommendation. He has a right to recommend that.
>
> MR. HART [Prosecutor]: Could I say something before we start taking the plea?
>
> THE COURT: Sure.
>
> MR. HART: I just want the defendant to be absolutely stone cold aware as to what is going on. He is pleading guilty to first degree murder.

THE COURT: Mandatory life imprisonment, do you understand that [addressing Respondent] ?

MR. MILLER: Yes.

THE COURT: The only hope that you got [is] if I am convinced to treat you as a juvenile for the purpose of disposition, do you understand that?

MR. MILLER: Yes sir.

THE COURT: Okay. Are any of the parents in court?

MR. LUSBY: The mother.

THE COURT: This has been discussed with you?

MRS. MILLER: Yes.

THE COURT: You want him to do this – well, you don't have any choice, but I want you to know.

MRS. MILLER: I understand he has with you (sic) that you might do it as a juvenile and you might do it as an adult.

THE COURT: If I do it as an adult he's got no hope.

MRS. MILLER: Right.

THE COURT: Okay.

MR. HART: Moreover let here be no mistake. We are asking that he be sentence (sic) as an adult. He is the worse (sic) of the actors in the entire scenario and I intend to hold a full disposition hearing.

* * * *

THE COURT: You want to offer the plea?

MR. LUSBY: Yes, your Honor, we are prepared to offer the plea.

The trial court then proceeded to inform Respondent of the possible punishments for first-degree murder and the other offenses. The trial court specifically informed Respondent that first-degree murder was punishable by a mandatory term of life imprisonment and was not parolable. At the plea hearing, Respondent stated that no one was forcing him to plead guilty, that he was pleading guilty freely, understandingly, and voluntarily, that his counsel had explained to him the possible sentences, that no one promised him that the judge would be lenient, and that he had discussed his guilty plea with his parents. Respondent then established a factual basis for the plea, in which he admitted that on February 8, 1990, he was at Clairpointe between Essex and Freud with Kermit Haynes and others; they were there for the purpose of stealing a car. Before they got to that location, he gave Kermit Haynes a .38 pistol. When a car came along, Haynes ran out into the street and shot at the car, which resulted in a man being killed.

As far as the evidentiary hearing to withdraw the guilty plea, Charles Lusby, Respondent's appointed trial counsel, testified that he advised Respondent to plead guilty to the charge of fist-degree murder. He had handled cases of

other juveniles, but this was the first time he ever gave such advice. He acknowledged that this advice was extraordinary, but the reason he advised Respondent to do this was because he felt that the recommendation to the trial court would be that Respondent should be sentenced as a juvenile as opposed to being sentenced as an adult offender, and that the trial court, that being Judge Roberson, would impose a juvenile sentence. In fact, all four of the reports did end up recommending sentencing as a juvenile. When asked if Respondent was heavily reliant on his advice, Lusby responded that Respondent was "practically totally relying upon it." He also discussed Respondent's pleading guilty with Respondent's parents; he told the parents that it was the right thing to do. He testified that Respondent was at first reluctant to plead guilty, because if he was wrong about the good possibility of Respondent being sentenced as a juvenile, that meant that Respondent would spend the rest of his life in prison.

Lusby acknowledged that in formulating his advice to Respondent to plead guilty, he never took into consideration the fact that the prosecution could appeal the sentence. Since this never occurred to him, he never discussed it with Respondent before Respondent pled guilty. After Respondent did plead guilty, and after all of the proofs were in relative to sentencing, however, the prosecutor, during argument on whether the trial court should sentence, did indicate that if Respondent was sentenced as a juvenile, the prosecution would appeal.[4] He did not think that any

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[4] What this question and answer were referring to was what the prosecutor, Marc Hart, expressed to Judge Roberson during arguments on whether the court should sentence Petitioner as an adult or as a juvenile:

appellate court would reverse the sentence on the facts as he knew them.

When asked if he discussed possible defenses with Respondent, Lusby responded that he discussed with Respondent the possibility of jury nullification and the defense of abandonment.

On cross-examination, Lusby was asked if he guaranteed to Respondent that he would be sentenced as a juvenile; he responded that he did not. He testified that Petitioner knew that there was a possibility that he could get sentenced as an adult. Lusby was asked if Respondent was present when Mr. Hart told Judge Roberson that the prosecution would appeal if Respondent was sentenced as a juvenile; he responded that Respondent was present. When asked if

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> MR. HART: Your Honor, before we get into the substance of the argument, let me just state our position up front and dispel any misunderstanding on what our position on this case is.
>
> * * * *
>
> It is our position that any sentence less than life in prison would be an affront to the integrity of the criminal justice system and an affront to the dignity of Benjamin Gravel and his family, and an affront to the people of this community who rely on the courts to protect them against marauding, ambushing people who prey upon law-abiding citizens.
>
> In the event that the Court imposes any sentence less than life in prison, it is the opinion of the Wayne County Prosecutor's Office that we will seek immediate review in the higher court to redress what we believe to be the woefully disproportionate leniency of the sentence.

Respondent asked him if he could withdraw his guilty plea or indicated to him that he wanted to withdraw his plea after having learned that the prosecution could appeal, Lusby responded that he told Respondent that did not think that the prosecution's appeal would be successful. He told Respondent this when Respondent expressed some concern.

Mr. Lusby was asked if, in the course of his discussions with Respondent about possible defenses, Respondent told him his version of the offense or what his involvement had been; Mr. Lusby responded that he did. He testified that Respondent told him that they were going to take a car and that there had already been an aborted attempt to take another car. This other attempt was to take a grey Chrysler; Respondent had gone up to this car with a gun and had tried to take this car. When asked if Respondent told him that he had fired shots at this car, Lusby responded that he thought so. Lusby testified that Respondent told him that after this attempt to take the one car, he (Respondent) gave the gun to Kermit Haynes. Lusby testified that this was where a possible defense of abandonment came in; it appeared as if Respondent was now deferring to the older boys. Lusby did acknowledge that Respondent did not go home at this point, but hung around with the other guys while the other car came down the street.

Respondent testified that advised him to plead guilty to first-degree murder; Lusby told him that his chances of going to trial were slim. He did not recall Lusby ever talking to him about lesser offenses or defenses. As far as his pleading guilty to first-degree murder, Lusby told him what to say in order for Judge Roberson to accept his guilty plea. What he told Judge Roberson about the offense was not accurate, however. When he gave Kermit the gun, he did not know that the plan was to take a car; he did not know what Kermit was going top do with the gun.

Lusby never told him that the prosecution could appeal if Judge Roberson sentenced him as a juvenile. Had her known this, he would not have pled guilty.

On cross-examination, Respondent testified that it was not his understanding when he pled guilty that he could be sentenced as an adult offender. He acknowledged, however, that Judge Roberson had advised him before he pled guilty that his only hope was if he (Judge Roberson) was convinced that he should be sentenced as a juvenile. He also acknowledged that Judge Roberson asked him if he wanted to take that chance, to which he responded that he did. He testified that when he gave that answer, he was lying.

Respondent testified further that when he told Judge Roberson that he had agreed to steal a car and that he supplied Kermit Haynes with the weapon, he was lying; his attorney told him to lie. Respondent acknowledged that prior to the giving Kermit the gun, he himself had gone up to a gray Chrysler with the gun. He testified that he did not shoot at this car; he shot in the direction of this car. When asked what he was trying to do when he did that, he responded that he was just trying to scare the driver, for "prank purposes." His intention was not try to take this car.

The trial court, Judge Roberson, granted Respondent's Motion to Withdraw Guilty Plea. One of the bases cited for granting the Motion was that Respondent's trial counsel had rendered constitutionally ineffective assistance of counsel in not advising Respondent that if he pled guilty as charged to first-degree murder and the other charges, and if Judge Roberson sentenced him as a juvenile, the prosecution could appeal that sentencing decision to the Michigan Court of Appeals and possibly have the sentence overturned with orders to Judge Roberson to sentence Respondent as an adult offender, meaning to non-parolable life.

REASONS FOR GRANTING THE WRIT

I. Neither the United States Supreme Court nor any federal circuit has held that a lack of advice of collateral consequences of a guilty plea renders the plea involuntary. The Sixth Circuit in this case held that counsel was ineffective, not for any misadvice, but for "failing" to advise the respondent that the State could appeal the trial judge's decision whether to sentence him as a juvenile or an adult. Does this ruling constitute a "new rule" under the AEDPA, not applicable on habeas corpus; in the alternative, is the state court holding that defendant was not deprived of effective assistance an objectively unreasonable application of *Hill v. Lockhart*[5] and *Strickland v. Washington*?[6]

This case involves no "misadvice" as to the sentencing consequences of Respondent's plea; he was warned repeatedly by the trial judge that he might well be sentenced as an adult, not as a juvenile, and there is no claim that his counsel advised him differently. Ineffective assistance was predicated on a finding that trial counsel had an *affirmative* obligation to advise Respondent that should he be sentenced as a juvenile, the prosecution *could* appeal – an act not

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[5] *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

[6] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

automatic, but requiring the exercise of independent judgment – and the result of the appeal *might* be an adult sentence – just as the trial judge had warned Respondent could occur as a consequence of his plea. The District Court held that the Michigan Court of Appeals' holding to the contrary was an unreasonable application of clearly established federal law, as determined by the United States Supreme Court in *Strickland v. Washington, supra*, and *Hill v. Lockhart, supra*. The Sixth Circuit Court of Appeals Opinion (the lead opinion, that is) agreed with the District Court.[7] But because neither this Court nor any federal circuit has found a guilty plea involuntary for a failure to advise of collateral consequences, and because ineffective assistance of counsel at a guilty plea occurs only when the resulting plea is involuntary,[8] the Sixth Circuit holding in this case constitutes a new rule, inapplicable under the AEDPA on habeas corpus.[9]

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[7] As will be discussed more fully in Argument II, the concurring opinion did not apply the deferential "objectively unreasonable" standard to the prejudice prong of *Strickland*.

[8] See e.g. *Johnson v Atherton*, 296 F.3d 991 (10th Cir. 2002); *DeVille v Whitley*, 21 F.3d 654 (4th Cir. 1994); *United States v Hernandez*, 234 F.3d 235 (5th Cir. 2000).

[9] At first blush, it might be argued that the proposition that counsel is ineffective in not advising a juvenile client that if he pleads guilty and is sentenced as a juvenile, the prosecution can appeal that sentence and possibly have it overturned, resulting in a sentence as an adult offender, is not a new rule but simply an application of *Strickland* and *Hill*, see *Sellan v. Kuhlman*, 261 F.3d 303, 309 (2nd Cir. 2001). But to find a plea involuntary for lack of advice regarding sentencing consequences is a new rule, and its "newness" cannot, or should not, be "shielded" by its incorporation into an ineffective assistance claim.

Petitioner submits that "incorporating" a new rule of involuntariness for guilty pleas based on a lack of advice as to a possible collateral consequence into an ineffective assistance claim should not shield the new rule from application of the AEDPA's prohibition of creation of new rules on habeas corpus. But even if *Strickland* is applied, the Sixth Circuit's majority ruling erroneously finds that the state court's unreasonably applied that case.[10]

Hill v. Lockhart, supra, established the applicability of the *Strickland* test to the guilty plea situation. First, the Court noted the existing case law that the voluntariness of the plea of a defendant represented by counsel during the plea process "depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' " *Id.* at 56, 106 S.Ct. at 369 (quoting *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970)). The Court then held that the two-pronged *Strickland* test previously applied in trial and trial-type situations was equally applicable to an attack on the voluntariness of a guilty plea, and further instructed that the second, or "prejudice" prong, required the defendant to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59, 106 S.Ct. at 370.

Applying *Hill v. Lockhart* to this case, the first question is whether the lack of advice that the prosecution could appeal a juvenile sentence constitutes deficient

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[10] As this Court recently noted in *Woodford v. Visciotti,* 537 U.S. –; – S.Ct. –; – L.Ed.2d – (Docket No. 02-137, decided November 4, 2002), "under § 2254(d)'s 'unreasonable application' clause, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied *Strickland* incorrectly. * * * * An unreasonable application of federal law is different from and incorrect application of federal law."

performance. The answer to this question turns on whether the prosecution's ability to appeal the sentence imposed by the trial court upon Respondent's plea of guilty would be a direct consequence or a collateral consequence of his plea, if indeed it can be called a "consequence" of the plea at all.

A direct consequence is one that has a definite, immediate, and largely automatic effect on the range of the defendant's punishment. *King v. Dutton,* 17 F.3d 151, 154 (6th Cir. 1994); *Parry v. Rosemeyer,* 64 F.3d 110, 114 (3rd Cir. 1995); *United States v. Campusano,* 947 F.2d 1, 5 (1st Cir. 1991) (cited with approval in *King v. Dutton*); *United States v. Brownlie,* 915 F.2d 527, 528 (9th Cir. 1990) (cited with approval in *King v. Dutton*). The fact that the prosecution could appeal the trial court's sentence of Respondent as a juvenile did not fall within the category of direct consequences, inasmuch as it was certainly not definite or automatic that the appellate courts would overturn Respondent's juvenile sentence if the prosecution appealed; in fact, there was a dissenting opinion when the prosecution did appeal and prevailed. See *People v. Haynes, supra,* 199 Mich. App. 593, 502 N.W.2d 758 (1993)

A collateral consequence of a guilty plea, on the other hand, is, for example, one that rests in the hands of another government agency or the defendant himself. *Torrey v. Estelle,* 842 F.2d 234, 236 (9th Cir. 1988). The fact that the prosecution had the right to appeal a juvenile sentence falls within this category.

The United States Constitution does not require defense counsel to inform an accused person of the collateral consequences of his guilty plea, *United States v Gonzalez,* 202 F.3d 20, 25-26 (1st Cir. 2000); *United States v. DeFreitas,* 865 F.2d 80, 82 (4th Cir. 1989); *United States v. Campbell,* 778 F.2d 764, 768 (11th Cir. 1985). Hence, the absence of advice of a collateral consequence cannot be held to fall below that objective standard of reasonableness as

contemplated by *Strickland v. Washington, supra*, and *Hill v. Lockhart,* supra.[11]

Assuming that the absence or lack of advice that the prosecution could appeal a juvenile sentence constitutes deficient performance, Respondent still failed to show prejudice from his trial attorney's lack of advice of the prosecution's appeal right.

First, Petitioner fails to see how the absence of advice to Respondent of the prosecution's appellate rights would have made Respondent's guilty plea unknowing and involuntary. Respondent was never advised by the trial court that sentencing as a juvenile offender was a certainty; rather, the opposite was the case. Hence, the fact that he might not have been told that the prosecution could appeal a sentence he was never assured of receiving in the first place should be of no consequence.

Second, when the prosecution had indeed appealed the trial court's imposition of the juvenile sentence, Respondent never moved to withdraw his guilty plea, even though

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[11] Petitioner is cognizant that the Michigan Court of Appeals did not employ this analysis in its Opinion reversing the trial court's grant of Petitioner's motion to withdraw guilty plea. This would not matter, however, if the AEDPA deferential standard is to be applied to the *result* of the state court decision as opposed to the reasoning or lack thereof that the state court employed.

Petitioner is also cognizant that the lead opinion by the Sixth Circuit in this case declined to apply a collateral consequences analysis, citing its own precedent, *Harris v. Stovall,* 212 F.3d 940, 944 (6th Cir. 2000), for the proposition that it is error to rely on authority other than that of this Court. If this Court were, however, to reconsider and adopt the "any rational jurist " standard (see Argument II), it would, it seems, be appropriate to consider what the other circuit courts, which are presumably made up of rational jurists, have decided on a point of law to determine whether a particular state court decision is an unreasonable application of Federal law.

Respondent could have asked the Michigan Court of Appeals to remand the matter back to the trial court to allow him to so move in the trial court. See e.g. *United States v. Arvanitis*, 902 F.2d 489, 494-495 (7th Cir. 1990) (defendant could not claim prejudice from attorney's inaccurate estimate of applicable offense severity rating for crimes to which he pled, and could not maintain ineffective assistance claim, *having previously foregone opportunity to withdraw plea with knowledge that attorney's prediction was wrong*).

Petitioner submits that what Respondent's apparent decision not to move to withdraw his guilty plea during the pendency of the Prosecutor's appeal of his juvenile sentence demonstrates is that the fact that the prosecution appealed the trial court's sentence of Respondent as a juvenile simply was not that important to Respondent, certainly not important enough for him to want to move to withdraw his plea so as not to take the chance that the Michigan Court of Appeals would issue a ruling adverse to him. The fact that Respondent did not move to withdraw his guilty plea until *after* the Michigan Court of Appeals reversed his sentence as a juvenile and the Michigan Supreme Court denied his Application for Leave to Appeal also demonstrates that the only real reason Respondent moved to withdraw his guilty plea was the fact that the trial court was directed by the Michigan Court of Appeals to impose a sentence as an adult offender.

In like fashion, the dissenting opinion in this case observed:

> Neither petitioner attempted to withdraw his guilty plea after the prosecution actually appealed; rather, they argued their case on the merits before the Court of Appeals. This makes sense: even with the possibility of prosecutorial appeal, the chance to be sentenced as a juvenile was their only option short of trial. Petitioners wanted a juvenile

> sentence, not a new trial. Petitioners, through counsel, gamed the system and attempted to withdraw their guilty pleas only after their juvenile sentences were rejected by the Court of Appeals. This post-conviction strategy gave petitioners two bites of the apple; that they now argue they would have given up their first (and *ex ante* more likely) bite because of the possibility of prosecutorial appeal defies credence.[12]

If there was no logic to support the result of the Michigan Court of Appeals decision in this case, it could truly be said that the result was objectively unreasonable. But there is logic to support it.

Because, then, the Sixth Circuit has incorporated a new rule of plea involuntariness for lack of advice – not misadvice – regarding collateral consequences into an ineffective assistance analysis, the AEDPA bars relief. In the

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[12] Petitioner is cognizant that the lead opinion minimizes the fact that Respondent did not move to withdraw his guilty plea once he found out that the prosecution could appeal his juvenile sentence, when the prosecution did in fact appeal his juvenile sentence, by observing that by that time the case was in the appellate courts, not the trial court, where withdrawal pleas had to be made. Lead opinion. n. 14. As Petitioner argued below, however, Respondent could have moved to have the case remanded from the Michigan Court of Appeals to the trial court so that he could move to withdraw his guilty plea. It is likely that there would have been no opposition to that by the prosecution since the prosecution objected to the guilty plea in the first instance. Of course, once Respondent elected instead to take his chances with the appellate process, which as the dissenting opinion notes, was a reasonable tact to take, the prosecution naturally objected once Respondent, having lost in the appellate courts, then moved to withdraw his guilty plea.

alternative, the state court determination that counsel was not ineffective in this situation is not an unreasonable application of *Strickland*.

II. The question left open by this Court's Opinion in *Williams v. Taylor*[13] is whether a state-court decision, purporting to dispose of a federal challenge on the merits but failing to articulate any reasoning or controlling federal authority, is an "adjudication" falling under the AEDPA § 2254 deferential standard of review. This Court should address this issue inasmuch as it has led to conflicting opinions in the circuits and because the answer to the question would be outcome-determinative in this case.

In this case, the District Court granted Respondent's habeas petition on one of the same bases the trial court granted Respondent's motion to withdraw his guilty plea, that is that Respondent's trial counsel had rendered constitutionally ineffective assistance of counsel in not advising Respondent that if he pled guilty as charged to first-degree murder and the other charges, and if Judge Roberson sentenced him as a juvenile, the prosecution could appeal that sentencing decision to the Michigan Court of Appeals and possibly have the sentence overturned with orders to Judge Roberson to sentence Respondent as an adult offender, meaning to non-parolable life.

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[13] *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

In a split decision, with Judge Gilman rendering a separate concurring opinion, and Judge Boggs rendering a dissenting opinion, the Sixth Circuit affirmed the District Court's grant of the Writ of Habeas Corpus.

Judge Gilman, in his concurring opinion, held that because the Michigan Court of Appeals had not reached the prejudice prong of *Strickland v. Washington, supra*, the Court was not bound by the AEDPA's deferential standard of review.[14] Judge Gilman cited a Tenth Circuit case for this proposition, *Gonzales v. McKune,* 247 F.3d 1066, 1075-76 (10th Cir. 2001), and, based on that authority, applied a de novo standard of review to the issue of prejudice. Judge Gilman was correct to the extent that the Michigan Court of Appeals never reached the issue of prejudice; this was so because the Michigan Court found that there was no showing of deficient performance (the first prong under *Strickland*), and so, no need to address prejudice.

On the other hand, Judge Boggs, in his dissenting opinion, cited a Sixth Circuit case, *Harris v. Stovall,* 212 F.3d 940, 943, (6th Cir. 2000), which had held that where a state court decides a constitutional issue by form order or without extended discussion, a habeas court should focus on the *result* of the state court's decision, and perform an unreasonable application analysis. Based on that authority, Judge Boggs applied an unreasonable application analysis to the question of prejudice under *Strickland*, even though the Michigan Court of Appeals had not addressed the prejudice prong.

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[14] The deferential standard of review being, of course, that habeas relief may not be granted unless the state court adjudication resulted in a decision that is an unreasonable application of clearly established Federal law as determined by this Court.

In *Sellan v. Kuhlman, supra,* 261 F.3d at 313, n. 5, the Second Circuit aptly noted that there remained, in the Sixth Circuit, some unacknowledged tension between panel opinions on this issue. There still is, as a reading of the concurring and dissenting opinions in this case demonstrate. But, there is also a split among the various circuits. See again, *Sellan, supra,* 261 F.3d at 313, n. 5, and see Dodson, Habeas Review of Perfunctory State Court Decisions, 29 Am.J.Crim.L. 223, 227 (2002) ("The question begged by *Williams* is whether a state-court decision, purporting to dispose of a federal challenge on the merits but failing to articulate any semblance of reasoning or controlling federal authority, is an 'adjudication' falling under the AEDPA § 2254 deferential standard of review. The question has raised controversy in the lower courts.").

An answer to the question of whether the AEDPA deferential standard of review and the "objectively unreasonable" test apply to a state court's reasoning or to its ultimate decision, even absent any reasoning, would be outcome-determinative in this case. Indeed, as noted previously, Judge Gilman, in his concurring opinion, applied a de novo standard of review to the *Strickland* prejudice issue, whereas Judge Boggs applied the AEDPA deferential "objectively unreasonable" standard. Why the result of this case would have been different had the concurring opinion applied the same test that the dissenting opinion did is illustrated by the fact that the concurring opinion began with the candid observation that this was "an extremely close case." A number of courts have observed that a state court's decision in a close case cannot by definition be objectively unreasonable. See e.g. *Seymour v. Walker,* 224 F.3d 542, 554 (6th Cir. 2000), *cert. denied,* 532 U.S. 989, 121 S.Ct. 1643, 149 L.Ed.2d 502 (2001) ("In light of the closeness of the question, the trial court's finding cannot be said to be an unreasonable application of [United States Supreme Court precedent]."); *O'Brien v. Dubois,* 145 F.3d 16, 27 (1st Cir. 1998) ("We regard the question as a close one – but, under

AEDPA's newly minted standard of review, the very closeness of the call militates strongly against the granting of habeas redress."); *Matteo v. Superintendent, SCI Albion,* 171 F.3d 877, 895 (3rd Cir, 1999), *cert. denied sub. nom. Matteo v. Brennan,* 528 U.S. 824, 120 S.Ct. 73, 145 L.Ed.2d 62 (1999) ("To the extent the issue is a close one, AEDPA directs us to defer to the state court decision."). Thus, had Judge Gilman applied the deferential standard of review, he would have had to conclude, by necessity, that the Michigan Court of Appeals decision was not unreasonable.

Inasmuch as the question of whether the AEDPA deferential standard of review and the "objectively unreasonable" test apply to a state court's reasoning or to its ultimate decision is a question that this Court should address, and, because the answer would be outcome-determinative in this case, the question becomes: to what does the deferential standard apply.

Petitioner would pose the same rationale that the Second Circuit, in *Sellan v. Kuhlman, supra,* posed, in addressing the question and arriving at the conclusion that the deferential standard of review applies to a state court's ultimate decision, even if the decision does not contain any reasoning as to how the result was arrived at. How the Court in *Sellan* arrived at its conclusion is as follows:

> Section 2254(d)(1)'s "unreasonable application" test is triggered when a federal claim has been "adjudicated on the merits" in state court. Thus, the application of §§ 2254(d)(1) turns on the meaning of "adjudicated on the merits" - more specifically, on whether a federal claim is "adjudicated on the merits" when the state court decision that disposes of it neither discusses the claim nor references federal law.

* * * *

> Nothing in the phrase "adjudicated on the merits" requires the state court to have explained its reasoning process. Nowhere does the statute make reference to the state court's process of reasoning. *See Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir.1999). As the Fourth Circuit has explained, when a state court fails to articulate the rationale underlying its rejection of a petitioner's claim, and when that rejection is on the merits, the federal court will focus its review on whether the state court's ultimate decision was an "unreasonable application" of clearly established Supreme Court precedent. *See Bell v. Jarvis*, 236 F.3d 149 (4th Cir.2000), *petition for cert. filed* (U.S. Mar. 29, 2001).
>
> In sum, the plain meaning of §§ 2254(d)(1) dictates our holding: For the purposes of AEDPA deference, a state court "adjudicate[s]" a state prisoner's federal claim on the merits when it (1) disposes of the claim "on the merits," and (2) reduces its disposition to judgment. When a state court does so, a federal habeas court must defer in the manner prescribed by 28 U.S.C. §§ 2254(d)(1) to the state court's decision on the federal claim – even if the state court does not explicitly refer to either the federal claim or to relevant federal case law.

261 F.3d at 311-312.

Dodson, in his article, Habeas Review of Perfunctory State Court Decisions on the Merits, supra, 29 Am.J.Crim.L. at 242-243, arrives at the same conclusion.

III. To grant habeas corpus relief, the state court decision must have been either contrary to or an unreasonable application of settled federal constitutional principle as determined by this Court. An unreasonable application is not simply one that is erroneous or incorrect. Given the rejection of the "any rational jurist" test by this Court, certiorari should be granted to give further guidance, so that federal courts do not simply conclude that because they disagree with the state courts the state court decision was therefore unreasonable.

In *Williams v Taylor, supra,* 529 U.S. at 409-410, 120 S.Ct. at 1521-1522, this Court rejected the view of some circuits that the state court application of settled federal constitutional principles as determined by this Court can only be unreasonable if the state court "has applied federal law in a manner that reasonable jurists would all agree is unreasonable." Instead, said this Court, the reviewing court should simply determine whether the state court acted unreasonably, bearing in mind that "the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." In other words, "a federal habeas court may not grant relief simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." This Court reaffirmed this latter principle in *Bell v. Cone,* – U.S. – , 122 S.CT. 1843, 152 L.Ed.2d 914 (2002).

The concurring opinion in this case expressly stated that it was not applying the deferential AEDPA standard of review to the Michigan Court of Appeals decision, and explained why not. The lead opinion was not so candid.

While the lead opinion states that the Michigan Court of Appeals Opinion was an unreasonable application of United States Supreme Court precedent, that is *Hill v. Lockhart, supra*, and *Strickland v. Washington, supra*, a reading of the lead opinion's analysis reveals that the lead opinion analyzed the case as if it were reviewing the case on a direct appeal of a federal criminal case and not under the highly deferential standard of 28 U.S.C. § 2254(d)(1) and *Williams v. Taylor*.

Petitioner submits that this case demonstrates that further guidance from this Court is needed as to the application of the "unreasonable " requirement of the federal statute. Petitioner suggests that if the state court decision – even if viewed as wrong as an independent matter by the habeas court – is within the range of "plausible outcomes," the writ must be denied. Or, Petitioner submits, this Court's reconsideration of its rejection of the "any rational jurist" test might be appropriate, particularly in light of this Court's statement in *Slack v McDaniel*, 529 U.S. 473, 484,120 S.Ct. 1595, 1604, 146 L.Ed.2d 462 (2000), that the test for a certificate of appealability is whether "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right."

Consideration of this important question warrants the attention of this Court.

RELIEF

Wherefore, Petitioner respectfully requests that this Honorable Court grant certiorari in this matter.

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Dated:

APPENDIX A

00-2150/2163

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CORTEZ MILLER,	)	**Filed**
Petitioner-Appellee,	)	**Oct. 02, 2002**
	)	**Leonard Green,**
v.	)	**Clerk**
	)	**Order**
DENNIS M. STRAUB, WARDEN,	)	
Respondent-Appellant.	)	

BEFORE: BOGGS, GILMAN, and BRIGHT, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge Boggs would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

_____/S/_____

Leonard Green, Clerk

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*Hon. Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

APPENDIX B

RECOMMENDED FOR FULL PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

File Name: 02a0265p.06

No. 00-2150

Cortez Miller,

Petitioner-Appellee,

v.

Dennis M. Straub, Warden,

Respondent-Appellant.

No. 00-2163

Kermit Eldridge Haynes,

Petitioner-Appellee,

v.

Luella Burke, Warden, Saginaw Correctional Facility,

Respondent-Appellant.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

Nos. 98-74655; 98-73406--Denise Page Hood,

District Judge.

Argued: October 26, 2001

Decided and Filed: August 8, 2002

Before: BOGGS, GILMAN, and BRIGHT, Circuit Judges.(*)

COUNSEL

ARGUED: Thomas M. Chambers, OFFICE OF THE PROSECUTING ATTORNEY, Detroit, Michigan, for Appellants. John R. Minock, CRAMER MINOCK, Ann Arbor, Michigan, Marla R. McCowan, STATE APPELLATE DEFENDER OFFICE, Detroit, Michigan, for Appellees. **ON BRIEF:** Thomas M. Chambers, OFFICE OF THE PROSECUTING ATTORNEY, Detroit, Michigan, for Appellants. John R. Minock, CRAMER MINOCK, Ann Arbor, Michigan, Marla R. McCowan, Susan M. Meinberg, STATE APPELLATE DEFENDER OFFICE, Detroit, Michigan, for Appellees.

BRIGHT, J., delivered the opinion of the court. GILMAN, J. (pp. 24-28), delivered a separate concurring opinion. BOGGS, J. (pp. 29-33), delivered a separate dissenting opinion.

OPINION

MYRON H. BRIGHT, Circuit Judge. The wardens of two Michigan state correctional institutions appeal a federal district court's conditional grant of habeas corpus to prisoners Cortez Miller and Kermit Haynes on the ground of ineffective assistance of counsel. Haynes and Miller are currently serving life sentences without parole after pleading guilty to first degree murder.

In 1990, Miller and Haynes were fifteen and sixteen years old, respectively. Each, on the advice of his own defense counsel, pled guilty in Michigan state court to first degree murder. Their attorneys believed it likely that the trial court would impose juvenile sentences. The trial court did sentence them as juveniles. In each case, the prosecution appealed and the Michigan Court of Appeals reversed. Miller and Haynes each then received the only available adult sentence under Michigan law: life in prison without possibility of parole. Neither Miller's nor Haynes' trial counsel considered or advised their respective clients that the prosecutor could appeal the imposition of a juvenile sentence.

Miller and Haynes petitioned for writs of habeas corpus, and the federal district court(1) concluded that the failure of their defense attorneys to inform them of the prosecutor's right to appeal, particularly in light of their youth at the time of the pleas, constituted ineffective assistance of counsel. The court further concluded that a contrary determination on the facts and the law by the Michigan Court of Appeals constituted an unreasonable application of clearly established federal law as determined by the United States Supreme Court in *Williams v. Taylor*, 529 U.S. 362 (2000); *Hill v. Lockhart*, 474 U.S. 52 (1985); and *Strickland v. Washington*, 466 U.S. 668 (1984). Accordingly, the court separately granted Miller's and Haynes' petitions for writs of habeas corpus on the ground of ineffective assistance of counsel.(2) The wardens appeal. After a careful review of the records in the two cases, we AFFIRM the district court.

I. BACKGROUND

Kermit Haynes and Cortez Miller are two of six youths(3) charged by the state of Michigan with the 1990 murder of Benjamin Gravel. The state charged Haynes and Miller each with first degree felony murder, assault with intent to rob while armed, and possession of a firearm during commission of a felony.

A. Miller's Plea

On March 23, 1990, Miller pled guilty before Chief Judge Roberson of the Recorder's Court for the City of Detroit. He was fifteen years old at the time. At the plea hearing, the court questioned Miller as to whether he understood that if he pled guilty, his "only hope" to avoid mandatory life imprisonment lay in convincing the court to treat him as a juvenile. Miller answered that he understood. Miller's mother, who was present at the plea hearing, stated that Miller's plea had been discussed with her and that she understood that the judge might sentence her son as a juvenile or as an adult.(4) The prosecutor advised the court that his office would request that the court sentence Miller as an adult.

The court then questioned Miller. Miller affirmed that he was making his plea freely, understandingly, and voluntarily. He acknowledged an understanding of the various trial rights he was foregoing by pleading guilty. Miller affirmed his understanding that first degree murder was punishable by a maximum sentence of life imprisonment without parole. The court described the situation to Miller: "the only hope that you [have] in this plea is if I decide to treat you as a juvenile for the purpose of disposition. You heard [the prosecutor] say that they are going to want to hold a lengthy disposition hearing, do you

understand that?" Miller stated that he understood, and specifically acknowledged that he was "taking that chance."

The court then questioned Miller briefly as to the factual basis for his plea. Miller stated that he was part of a group that decided to steal a car. Sometime before the crime he gave Haynes a gun knowing that Haynes planned to use it to steal a car. Miller acknowledged knowing the inherent danger to life when a car is taken at gunpoint.

Over the course of the next year, Chief Judge Roberson held several hearings on the disposition of Miller's sentence. On February 22, 1991, Miller's counsel made closing arguments to the court at the final hearing in Miller's case. At that hearing, the prosecutor announced that if the court sentenced Miller as a juvenile the prosecution would appeal.(5) On June 17, 1991, the court sentenced Miller to confinement in a juvenile institution until age twenty-one.

B. Haynes' Plea

On March 27, 1990, Haynes pled guilty to all charges against him, also before Chief Judge Roberson. He was sixteen years old at the time. At the plea hearing, his counsel, Wilfred Rice, stated that he had discussed the matter with Haynes and his family and that Haynes, with the acquiescence of his father, wanted to enter a plea of guilty as charged. Rice stated that Haynes understood that the court could sentence him as an adult or as a juvenile, and affirmed that Haynes understood that the prosecutor would attempt to convince Chief Judge Roberson that Haynes should be sentenced as an adult.

The court questioned Haynes directly about whether he understood that, if he pled guilty, "the only option you

have in this case, the only escape you have in terms of mandatory life, [is] if the prosecution can't convince me to treat you as an adult." Haynes stated that he understood.

Haynes stated that he had talked to his parents about his guilty plea. He affirmed that he was not being coerced into his plea and that he made his plea freely, understandingly, and voluntarily. He also affirmed an awareness of the various trial rights he was foregoing by pleading guilty.

The court then questioned Haynes briefly about the factual basis for his plea. Haynes stated that other boys in the group pulled a tree branch into the street to force cars to stop. When the victim, Gravel, stopped his car in front of the tree branch, Haynes ran out to the car intending to steal it. He was carrying a handgun Miller had given him. As Haynes approached the car, it pulled away and he fired at the car. Haynes specifically admitted that he shot at the car as part of his attempt to steal it.

Over the course of the next year, Chief Judge Roberson held several hearings on the disposition of Haynes' sentence. On August 28, 1991, the court sentenced Haynes to confinement in a juvenile institution until age twenty-one.

C. Post-plea Events

After Chief Judge Roberson ordered that Miller and Haynes be sentenced as juveniles, the prosecutor appealed each sentence.(6) The state court of appeals reversed on each defendant and remanded for imposition of the adult sentence: mandatory life imprisonment without parole on the first degree murder charge. *People v. Miller*, 503 N.W.2d 89 (Mich. App. 1993); *People v. Haynes*, 502

N.W.2d 758 (Mich. App. 1993). The state supreme court denied the defendants' applications for leave to appeal those results.

On remand before Chief Judge Roberson, the defendants moved to withdraw their guilty pleas and for evidentiary hearings on those motions. Haynes and Miller each alleged that their guilty pleas had been involuntary due to ineffective assistance of trial counsel. They asserted, among other things, that their attorneys' failure to inform them that the prosecutor could appeal the imposition of a juvenile sentence constituted ineffective assistance of counsel. The court granted the motions for evidentiary hearings.

The prosecutor applied to the state court of appeals for leave to file an interlocutory appeal of the orders granting evidentiary hearings. The Michigan Court of Appeals denied the application. The Michigan Supreme Court, in lieu of granting leave to appeal, vacated the trial court's orders granting the evidentiary hearings and directed that Haynes and Miller be sentenced "forthwith" as adults "without prejudice to subsequent consideration of the motion[s] to withdraw the plea[s] of guilty." *People v. Miller*, 527 N.W.2d 513 (Mich. 1994); *People v. Haynes*, 527 N.W.2d 512-13 (Mich. 1994).

On December 19, 1994, Chief Judge Roberson imposed sentences of life imprisonment without possibility of parole. The court subsequently held separate evidentiary hearings on Miller's and Haynes' motions to withdraw their guilty pleas.

Haynes was the only witness at his evidentiary hearing.(7) Haynes testified that he talked with his counsel, Wilfred Rice, twice in the three weeks before his guilty plea. Each visit lasted less than thirty minutes and each

centered on Rice's advice that Haynes plead guilty before Chief Judge Roberson. Haynes testified that he was hesitant to plead guilty, but that Rice repeatedly told him that it was in his interest to plead before Chief Judge Roberson, where he would "have great chances of being sentenced as a juvenile."

Haynes testified that Rice never told him that, even if Chief Judge Roberson sentenced him as a juvenile, the prosecutor could still appeal that sentence and an appellate court could impose an adult sentence of life without parole. Haynes stated that he would not have pled guilty had he known this.

Q So what is your understanding if you plead guilty and you made it through the sentencing hearing and you could convince the judge to sentence you as a juvenile, did you think there was anything after that?

[Haynes] No. Besides the fact that I'd be going to [a juvenile facility].

. . . .

Q Did you have any idea that the prosection [sic] had any other option besides that hearing that they had in front of the Judge?

[Haynes] No.

Haynes J.A. at 176-77.

Haynes also stated that he was innocent of first degree murder because he did not intend to harm anyone.

Contrary to his testimony at the original plea hearing, Haynes denied shooting at the car. He claimed that at the plea hearing he was "under advisement" of his attorney to say that he shot at the car.

We turn to Miller's further proceedings. At the evidentiary hearing on Miller's motion to withdraw his guilty plea, Miller's trial counsel, Charles Lusby, testified. He stated that he only did trial work and never handled appeals. Lusby testified that he considered abandonment to be a possible defense for Miller because when Miller gave the gun to Haynes he was deferring to the older boys in the group. He testified that Miller "practically totally rel[ied]" on his advice, and that he convinced Miller's parents, who also relied on him, that pleading guilty was in Miller's best interest.

Lusby stated that Miller was "reluctant" to plead guilty, but that he "prevailed upon him," by telling him he likely would be sentenced as a juvenile. Lusby testified that, based upon his familiarity with the juvenile sentencing process, he believed Chief Judge Roberson would sentence Miller as a juvenile. Lusby considered his advice that Miller plead guilty to first degree murder to be "extraordinary."

Lusby admitted that his considerations in formulating this advice did not include any factor beyond what the trial court would do.

Q In formulating your advice to Mr. Miller, did you take into account the fact [that] the prosecutor had since I believe 1988 the right to appeal a sentence?

[Lusby] No, I did not.

Q Did you stop to consider that, did it occur to you?

[Lusby] That didn't occur to me at all.

Q Did you discuss that possible risk with Mr. Miller?

[Lusby] I discussed a lot of things with him, but that was not one of them. It didn't occur to me that the prosecutor would do it, nor that the appellate court would reverse that decision.

Miller J.A. at 254-55.

Lusby also testified that he recalled the prosecutor stating in his closing argument at the sentencing hearing that he would appeal if Miller received a juvenile sentence. Lusby explained that Miller "was struck" by the prosecutor's statement, but "I think I told him I didn't think [the prosecutor] would be successful."

Miller also testified. He stated that when Lusby advised him to plead guilty, Lusby did not tell him that the prosecutor could appeal and that the court of appeals had the authority to overturn Chief Judge Roberson's decision. Miller stated that, had he known, he would not have pled guilty.

Regarding the factual basis for his plea, Miller stated that the version of the facts he gave at the plea hearing was inaccurate: "I was speaking upon the elements that my lawyer told me to speak on as far as first degree murder." Miller stated that when Gravel was killed he was seventy-five yards from the car and running away. Contrary to the statements he made at his plea hearing, Miller stated that there had been no plan to take a car and that he did not know what Haynes was planning to do when he gave him the gun. He did not intend to take part in a robbery.

In October, 1995, the trial court determined that Miller's and Haynes' guilty pleas had not been voluntary, knowing, and intelligent due to ineffectiveness of trial counsel. The court granted each his motion to withdraw his guilty plea. The Michigan Court of Appeals granted leave to the prosecutor to appeal those orders.

In a consolidated decision addressing Miller's and Haynes' cases along with another similarly situated appellant, Dashawn Lyons,(8) the appeals court reversed the trial court. *People v. Haynes (After Remand)*, 562 N.W.2d 241 (Mich. App. 1997). The court determined that the record showed Miller and Haynes were aware at the time they pled guilty that they might be sentenced as adults to mandatory terms of life imprisonment without possibility of parole. In addition, Miller knew from the prosecutor's closing argument at his final sentencing disposition hearing that the prosecution could appeal if Miller received a juvenile sentence from the trial court. Despite the knowledge each had, Miller and Haynes pled guilty and did not move to withdraw their pleas until after the conclusion of the appeal regarding their sentences. Therefore, the court concluded, Miller and Haynes understood the consequences of their pleas, and the pleas were knowingly, understandingly, and voluntarily made. *Haynes (After Remand)*, 562 N.W.2d at 246, 248. The Michigan Supreme Court denied Miller and Haynes leave to appeal.

Miller and Haynes petitioned the federal district court for writs of habeas corpus. The court granted the writs, ordering that Miller and Haynes be released unless they were given trials. The district court concluded that Miller's and Haynes' trial counsel were ineffective in failing to advise them of the prosecutor's right to appeal.(9) As a result, Miller and Haynes had not pled guilty voluntarily or knowingly. The wardens appealed to this court.

I. DISCUSSION

A. Habeas Corpus Review

Provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) codified at 28 U.S.C. §§ 2254(d) govern our review of the state court decisions in this habeas corpus case.

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

28 U.S.C. §§ 2254(d)(1).

The federal district court considered Miller's and Haynes' petitions for habeas corpus under the "unreasonable application" prong of this statute. None of the parties argue that the federal district court should have inquired whether the Michigan Court of Appeals decision was "contrary to" clearly established federal law. We proceed, therefore, under the "unreasonable application" prong of 28 U.S.C. §§ 2254(d)(1).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court elucidated the terms of 28 U.S.C. §§ 2254(d)(1). First, the Court explained that "clearly established Federal law, as determined by the Supreme

Court" refers to the Court's holdings, as opposed to dicta, at the time of the relevant state court decision. *Id.* at 412. Second, the Court explained that a state court decision unreasonably applies Supreme Court precedent by either: (1) identifying the correct governing legal rule from Supreme Court precedent but unreasonably applying it to the facts; or (2) unreasonably extending a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refusing to extend that principle to a new context where it should apply. Id. at 407. Finally, the Court declared that the application of law must be objectively unreasonable, id. at 409, and not merely incorrect or erroneous.(10) *Id.* at 411.

B. Ineffective Assistance of Counsel

In *Hill v. Lockhart*, 474 U.S. 52 (1985) and *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set out the law applicable to an ineffective assistance of counsel claim such as that made by Miller and Haynes. Both *Hill* and *Strickland* were clearly established federal law as determined by the Supreme Court at the time of the final Michigan Court of Appeals decision in 1997. *See Williams*, 529 U.S. at 391, 406 (referring to *Strickland* as "clearly established precedent" at the time of a Virginia state court's 1997 decision).

Under *Strickland*, a defendant claiming ineffective assistance of counsel must show both deficient performance by counsel and prejudice to the defendant resulting from that deficient performance. 466 U.S. at 687. To be deficient, counsel's performance must fall below an objective standard of reasonableness. Id. at 687-88; *Hill*, 474 U.S. at 58-59. In *Hill*, which applied Strickland to the guilty plea context, the Court explained that a defendant shows prejudice by demonstrating "a reasonable probability

that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

Although the Michigan Court of Appeals did not mention either Hill or *Strickland* by name, it did apply the law of those cases.(11) Thus, we must examine whether that court applied *Hill* and *Strickland* unreasonably.

We emphasize that *Hill* and *Strickland* state the relevant law in this case. Relying on a string of circuit court cases, the wardens argue that defense counsels' failure to inform Miller and Haynes of the prosecution's right to appeal the imposition of a juvenile sentence does not comprise ineffective assistance because the prosecutor's right of appeal represents a collateral, as opposed to a direct, consequence of the plea. We reject this argument on two grounds.

First, the wardens' reliance on circuit court cases is improper. The AEDPA prohibits use of lower court decisions in determining whether the state court decision is contrary to, or is an unreasonable application of, clearly established federal law. *Williams*, 529 U.S. at 412 (defining "clearly established law as determined by the Supreme Court" to mean holdings of Supreme Court decisions); *Harris*, 212 F.3d at 944 (holding district court erred in "rely[ing] on authority other than that of the Supreme Court of the United States in its analysis under §§ 2254(d)").

Second, the wardens' argument is incompatible with Supreme Court case law. The Court does not use a direct/collateral consequence categorization scheme to decide ineffective assistance of counsel claims. Indeed, in *Hill*, the Supreme Court reviewed an Eighth Circuit decision holding that parole eligibility was not a "direct consequence" of a guilty plea. *See Hill v. Lockhart*, 731 F.2d 568, 570-73 (8th Cir. 1984). The Court noted this holding, but eschewed any

such characterization in favor of directly applying *Strickland* to the plea context. *Hill*, 474 U.S. at 55, 57-60. As the Court stated in *Williams*: "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." 529 U.S. at 391.

C. Analysis

The federal district court concluded that the Michigan Court of Appeals decision was an unreasonable application of *Hill* and *Strickland*. We review *de novo* a district court's legal conclusions in a habeas corpus proceeding. *Miller v. Francis*, 269 F.3d 609, 613 (6th Cir. 2001). Where, as here, the district court's factual findings are based on a transcript from the state court proceedings and the district court makes no credibility determination, we also review those findings *de novo*. *Id.* We must determine whether it is an unreasonable application of *Hill* and *Strickland* to hold either: (1) that the petitioners' trial counsel provided them with objectively reasonable assistance; or (2) that even if the petitioners had been reasonably advised, they still would have pled guilty.

1. Performance of Counsel

The proper measure of attorney performance is whether counsel's assistance was reasonable "under prevailing professional norms" and "considering all the circumstances." *Strickland*, 466 U.S. at 688. We make a case-by-case examination of the evidence, *Williams*, 529 U.S. at 391, and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

The professional norms that guide us rest upon defense counsel's fundamental duties "to bring to bear such skill and knowledge as will render the trial a reliable

adversarial testing process" and "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Id.* at 688.

The federal district court articulated the circumstances relevant to the performance inquiry in this case:

> [T]rial counsel's performance was deficient within the meaning of the *Strickland* standard where he failed to advise petitioner that the prosecutor could appeal a juvenile sentence to a Michigan appellate court with the very real possibility that a higher court would order petitioner resentenced as an adult. Because of petitioner's young age, petitioner was particularly reliant on his attorney's advice to plead guilty to the offenses in this case. In light of what amounted to extraordinary advice by counsel that petitioner plead guilty to an offense which carried a mandatory sentence of life imprisonment without parole, counsel had a duty both to consider and to advise petitioner of the prosecutor's right to appeal any sentence to the Michigan appellate courts, with the possibility that petitioner's juvenile sentence would be overturned on appeal and he would then have to serve a nonparolable life sentence.

Haynes v. Burke, 115 F.Supp.2d 813, 819 (E.D. Mich. 2000).(12)

Miller's trial counsel, Lusby, brought to bear on this case his knowledge of the juvenile sentencing process and Chief Judge Roberson's sentencing practices. There is no doubt that in this regard Miller initially benefitted from Lusby's advice. Furthermore, Lusby adequately informed Miller regarding the risk related to Chief Judge Roberson's sentencing determination. Miller understood that if he pled guilty Chief Judge Roberson could opt to impose either a severe adult sentence of life imprisonment or a lenient juvenile sentence.

However, Lusby acted incompetently in failing to consider the likelihood that the prosecutor would exercise his right to appeal the district court's imposition of a juvenile sentence. Any juvenile sentence imposed on Miller would be less than six years in a juvenile facility. Given such a lenient sentence for first degree murder, it was unreasonable for Lusby not to have considered that the prosecutor could appeal and the juvenile sentence could be reversed. Yet Lusby did not factor this scenario into his advice to Miller that pleading guilty was in Miller's best interest.(13) Thus, Miller did not know that the prosecutor could appeal and that the juvenile sentence could be reversed, and, if so, Miller would serve a life sentence without possibility of parole.

Lusby should have considered these possibilities, informed Miller about them, and incorporated them into his risk assessment when he advised Miller about pleading guilty. He failed to do so. Rather, he advised Miller to plead guilty based solely upon his assessment of the relative risks in going to trial versus pleading guilty before Chief Judge Roberson. As a result, Lusby misinformed Miller regarding the likelihood he would receive an adult sentence. Miller was not fully apprised of the risks he faced.

The duty of defense counsel to consult is paramount when a client has to decide whether or not to waive a constitutional right, such as the right to trial. Because the decision whether or not to plead guilty ultimately rests with the client, *see Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"); *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring) ("[o]nly such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make"), counsel must ensure that the client's decision is as informed as possible. Failing even to consider, let alone notify the client of, a factor that could negate the entire benefit of the guilty plea is not within the range of professional norms.(14)

Miller's age and his heavy reliance on Lusby, a reliance Lusby acknowledged was "practically total[]," enhanced Lusby's duty to make certain that Miller understood all the risks associated with his guilty plea. Miller was fifteen years old and a year behind in school. His parents, according to Lusby, were themselves reliant on Lusby for advice. This case epitomizes the criminal defendant's need for what the Supreme Court has called the "guiding hand of counsel at every step in the proceeding against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

We conclude that Miller's trial counsel was incompetent. It is an objectively unreasonable application of *Hill* and *Strickland* for the Michigan Court of Appeals to hold otherwise.

Haynes testified that his trial counsel, Rice, similarly failed to inform him of the prosecutor's right to

appeal the trial court's imposition of a juvenile sentence. Due to Rice's death, Haynes was unable to offer any testimony which might corroborate this assertion. The Michigan Court of Appeals assumed that Haynes' defense counsel did not inform him that the prosecutor could appeal the trial court's sentencing decision. *Haynes (After Remand)*, 562 N.W.2d at 245 n.1. The federal district court accepted that assumption. *Haynes v. Burke*, 115 F.Supp.2d at 818. In her appeal to this court, Warden Burke does not challenge the fact that Rice did not inform Haynes of the prosecutor's right to appeal. There being nothing in the record to contradict the Michigan court's assumption, we adopt it.

With this assumption made, the reasoning from Miller's case applies. Like Miller, Haynes should have been fully apprised of the risks he faced, but was not. We conclude that Haynes' trial counsel was incompetent and that it is an objectively unreasonable application of *Hill* and *Strickland* for the Michigan Court of Appeals to hold otherwise.

2. Prejudice

To determine whether the petitioners were prejudiced by their attorneys' deficient performance, we ask whether there is a reasonable probability that, had they been advised of the prosecutor's right of appeal, they would have pled not guilty. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome; it is less than a preponderance of the evidence. *Strickland*, 466 U.S. at 694.

Both Miller and Haynes testified similarly at the evidentiary hearings on their plea withdrawal motions that each was initially hesitant to plead guilty, and that each would have pled not guilty had each known the prosecutor

could appeal. This testimony, though self-serving, may be enough by itself to satisfy the prejudice prong under the circumstances here. *See Magana v. Hofbauer*, 263 F.3d 542, 547 n.1 (6th Cir. 2001) (noting that, unlike the Seventh and Second Circuits, this Circuit has not explicitly adopted a requirement that in order to establish prejudice a defendant must come forward with objective evidence in addition to his post-conviction claim that he would have changed his mind about pleading guilty). The circumstances of these cases do not require that we resolve this issue today.

The wardens argue that Miller and Haynes could not have been prejudiced by any deficiency on the part of their trial counsel because they acknowledged at their March 1990 plea hearings that they could be sentenced to life imprisonment without parole.(15) According to the wardens, "the fact that [Miller and Haynes] might not have been told that the prosecution could appeal [the juvenile] sentence [they were] never assured of receiving in the first place should be of no consequence."

The wardens maintain that if a defendant is aware of the maximum possible sentence he cannot be prejudiced by his counsel's failure to inform him of the prosecutor's right to appeal. We decline to adopt the wardens' argument. An awareness of the sentencing range available to the trial judge is not the same as an informed understanding that a sentencing judge's decision is subject to reversal. The rule suggested by the warden would preclude courts from finding prejudice in any situation where the defendant knew the range of penalties to which he was subject.

Furthermore, the circumstances of these cases illustrate the failings of the wardens' argument. Miller and Haynes pled guilty in hopes of avoiding life imprisonment

without parole. A reduced likelihood of being sentenced as an adult was the sole benefit of their guilty pleas before Chief Judge Roberson. In reality, the risk of being sentenced as an adult came in two parts: (1) being sentenced as an adult by Chief Judge Roberson; and (2) having received a juvenile sentence from Chief Judge Roberson, being subject to a successful appeal by the prosecutor. Miller and Haynes, however, each received from his attorney information of only the first risk. Defense counsel's failure to assess all the risks and inform Miller and Haynes left each of them to make the most important decision of his life without essential information. Presented with all the risks, Haynes and Miller might well have decided to plead not guilty and to take their chances at trial. To meet the prejudice requirement under *Hill* and *Strickland*, Haynes and Miller need only show a reasonable probability that they would have pled not guilty had their attorneys competently advised them.

Miller puts forth additional evidence that, with competent assistance, he would have pled not guilty. Lusby testified that Miller pled guilty only reluctantly. The fact that Lusby had to prevail upon Miller to plead guilty tends to corroborate Miller's testimony that he would have pled not guilty had he known of the prosecutor's right to appeal. Lusby convinced Miller to plead, but did so without advising him of the full risk he faced of receiving a life sentence. This evidence shows that Miller would have been less likely to plead guilty had he been competently advised of all the risks.

Warden Straub argues that Miller actually knew before he was sentenced that the prosecutor could appeal. The prosecutor did state in his closing argument at Miller's final sentencing hearing that he would appeal if Miller was sentenced as a juvenile. However, the die had already been

cast. Miller's final sentencing hearing came eleven months after his plea had been accepted and Lusby dismissed the concerns Miller expressed to him about the prosecutor's statement because Lusby considered the prosecutor unlikely to succeed. Miller's failure suddenly to reject his counsel's advice, upon which he relied heavily, and press to withdraw his guilty plea a year after he made it does not show Miller was unprejudiced by Lusby's incompetence.

We conclude that Miller's and Lusby's testimony, along with reasonable inferences from the facts and circumstances of this case, are sufficient to demonstrate not only a reasonable probability that Miller would have decided to plead not guilty but also that a contrary conclusion is objectively unreasonable.

The untimely death of Haynes' trial counsel prevents him from offering any corroborative testimony that Haynes would have pled not guilty. In these special circumstances, we conclude that Haynes' claim and the absence of any evidence or tenable argument to the contrary is sufficient to establish not only a reasonable likelihood that he would have pled not guilty, but also that any contrary conclusion is objectively unreasonable.

III. CONCLUSION

We conclude that Miller and Haynes each received constitutionally ineffective assistance of counsel. We further conclude that decisions to the contrary on the facts of each case are unreasonable applications of clearly established federal law. We therefore **AFFIRM** the federal district court's conditional grant of habeas corpus separately for Miller and Haynes.

CONCURRENCE

RONALD LEE GILMAN, Circuit Judge, concurring. I fully concur with the lead opinion's conclusion that Miller's and Haynes's counsel were constitutionally ineffective because of their lawyers' failure to inform the petitioners that the state could appeal the decision of the trial judge to sentence them as juveniles. My reason for writing separately is to explain, in what I regard as an extremely close case, why I find the well-written dissenting opinion less persuasive than the lead opinion.

Like the lead opinion, I believe that the Michigan Court of Appeals's determination that Miller's and Haynes's counsel performed competently was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). The dissent, in contrast, finds counsels' performance to be constitutionally competent, a conclusion with which I disagree for several reasons.

First, in reaching the conclusion that the petitioners' counsel provided competent representation, the dissent does not address the failure of counsel to inform Miller and Haynes that the state could appeal the trial judge's sentencing decisions. The dissent instead focuses solely on whether counsels' strategy was reasonable in light of their knowledge of the trial judge's sentencing tendencies, thereby overlooking the very omission that in my opinion rendered the performance of the petitioners' counsel deficient.

Second, because Miller's and Haynes's counsel never considered the possibility of the state appealing the

trial judge's sentencing decisions, their advising the petitioners to plead guilty to first-degree murder cannot be considered a reasonable strategic decision to which deference should be accorded. *Strickland*, 466 U.S. at 690-91 (explaining that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"). As the lead opinion notes, a reasonable attorney would have considered the possibility of an appeal before advising Miller and Haynes to plead guilty under the circumstances of the present case.

Finally, I believe that the dissent's consideration of the strength of the state's case against the petitioners in assessing whether counsel provided competent representation, including the suggestion that their only available defense was a hope for jury nullification, focuses on the wrong issue. The petitioners, in my opinion, were entitled to be advised of the possibility of an appeal before deciding whether to plead guilty, because without that knowledge their decisions were not based upon all of the relevant facts. Although the Supreme Court has held that the Sixth Amendment does not require a correct assessment of the risks and benefits of pleading guilty as opposed to proceeding to trial, it recognizes that counsel must at least be aware of such risks, especially where the lack of awareness directly impacts the reasoning behind whatever advice is provided. *See McMann v. Richardson*, 397 U.S. 759, 770 (1970) ("Questions like these [relating to the risks of trial] cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be."); *United States v. Hanley*, 906 F.2d 1116, 1121 (6th Cir. 1990) (recognizing that "a

reversal for ineffective assistance would be in order" if the defendant had pled guilty solely in reliance upon his counsel's erroneous advice "that he would be eligible for parole in one-third the time he received for sentence").

I also agree with the lead opinion that if counsel had informed Miller and Haynes that the state could appeal the trial judge's sentencing decisions, a reasonable probability exists that both petitioners would have proceeded to trial rather than plead guilty. In considering *Strickland*'s "prejudice" prong, we are not bound by AEDPA's deferential standard of review, because the Michigan Court of Appeals never reached the issue of prejudice when it determined that counsels' performance was not deficient. *See Gonzales v. McKune*, 247 F.3d 1066, 1075-76 (10th Cir. 2001) (explaining that because the state court considered only two of three requirements necessary to establish a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), a de novo standard of review applied to the third element). I therefore believe that the dissent's application of AEDPA's "objectively unreasonable" test to the prejudice component of *Strickland* is not appropriate. *Williams v. Taylor*, 529 U.S. 362, 409 (2000) (clarifying the meaning of an "unreasonable application" of law under 28 U.S.C. §§ 2254(d)(1)).

The dissent concludes that Miller's and Haynes's efforts to withdraw their guilty pleas constituted attempts to get "a second bite at the apple," and that the petitioners entered their guilty pleas voluntarily and with full knowledge of the possible sentences that they faced. I respectfully disagree. Although Miller heard the prosecutor inform the trial judge that the state would appeal if Miller were sentenced as a juvenile, this statement came eleven months after his guilty plea, and was immediately neutralized by his counsel telling him not to worry about

any appeal. This advice once more disguised the additional risk of an appeal that Miller faced. Moreover, the record supports a finding that Miller's and Haynes's counsel, not the petitioners, made the decisions to pursue the appeals for their respective clients. There is no indication that anyone informed Miller or Haynes of the possibility of withdrawing their guilty pleas prior to sentencing or during the state's appeal of their sentences. I do not believe that Miller and Haynes should be penalized for what appears to be the decisions of their counsel to pursue the state-court appeals. Thus, the dissent's inference that Miller and Haynes were "gaming the system" is, in my opinion, unwarranted under these circumstances.

With respect to whether Miller and Haynes entered their guilty pleas knowingly and intelligently, I believe that the dissent underestimates the significance of a possible appeal in any calculation that the petitioners or their counsel made. Miller and Haynes might have believed that they had, say, an 80% chance of being sentenced as juveniles by the particular trial judge before whom they pled guilty. If they had been advised that the state could appeal, however, they might have evaluated the odds of the trial judge's determinations being sustained on appeal as only 50-50. The risk of the trial judge's sentencing decisions being reversed on appeal would, in this example, reduce the ultimate likelihood of Miller and Haynes being sentenced as juveniles from 80% to only 40%.

We are unable, of course, to determine the exact odds that Miller and Haynes believed that they faced prior to pleading guilty, but the above example illustrates the significance of failing to consider the possibility of the state appealing. The fact that Miller and Haynes were aware of the maximum penalty that they faced does not, therefore, negate the significance of the information that neither they

nor their counsel considered. Perhaps Miller and Haynes would have pled guilty even if they had known that the trial judge's sentencing decisions were not the only hurdle that they had to overcome in order to be sentenced as juveniles. But they were entitled to be advised of *all* the risks that they faced before choosing to plead guilty and foregoing their rights to jury trials.

Because I am not confident that Miller and Haynes would have pled guilty if their counsel had informed that their sentences could be appealed, I concur with the lead opinion in concluding that the decision of the Michigan Court of Appeals was an unreasonable application of *Strickland*. 28 U.S.C. §§ 2245(d)(1) (providing that a writ of habeas corpus is available for a person in state custody if the state court's adjudication of the petitioner's claim "resulted in a decision that . . . involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States"); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) ("[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."); *Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

DISSENT

BOGGS, Circuit Judge, dissenting. I disagree with the majority's analysis and would reverse the grant of habeas corpus. I therefore respectfully dissent. The Michigan Court of Appeals decided that, in this case, a

failure to inform a criminal defendant, before a guilty plea, that the prosecution may have a right to appeal his being sentenced as a juvenile, does not constitute ineffective assistance of counsel. To succeed on a claim of ineffective assistance of counsel, the petitioner must show (1) deficient performance by the attorney, and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). Legitimate trial tactics are expressly excluded from the definition of deficient performance. *Bell v. Cone*, 122 S. Ct. 1843, 1854 (2002). To establish prejudice after having pled guilty, the pleader must show a reasonable probability that he would not have pled, had he received competent advice. *Hill v. Lockhart*, 474 U.S. 52 (1985). In this case, petitioners have established neither element of *Strickland*.

At trial, petitioners faced near-certain conviction. The defenses that they would have asserted at trial were, in essence, vague hopes for jury nullification. Their defense counsel knew, however, that there was a very real hope that they could be sentenced as juveniles if they pled guilty, because of the sentencing habits of the particular judge in the case. Counsels' performance was not deficient; indeed, the idea for the gamble sprang from defense counsels' superior and intimate knowledge of the court. Their attorneys explained the ramifications of the decision to petitioners very carefully. Petitioners' parents were involved in the decisionmaking process. The decision to plead was calculated, voluntary, and informed; this is precisely the sort of competent representation that is excluded from the *Strickland* definition of deficient performance. *Strickland*, 466 U.S. at 689-90; *Cone*, 122 S. Ct. at 1854.

As for the prejudice element of *Strickland*, it seems clear that even with knowledge of the possibility of prosecutorial appeal, petitioners would still have pled

guilty. Miller was expressly informed at his sentencing hearing, on February 22, 1991, that the prosecution intended to appeal his sentence as a juvenile. Miller and his attorney noticed and discussed the prosecution's claim that it could appeal, but felt that the prosecution would be unsuccessful on appeal: a judgment that was not obviously unreasonable given the state of the law at that time. Miller did not attempt to withdraw his guilty plea as of the sentencing hearing. Haynes, despite the fact that his co-defendant had been warned of the possibility of prosecutorial appeal as of February 22, did not move to withdraw his plea during the five months before his own sentencing on August 28, 1991. Neither petitioner attempted to withdraw his guilty plea after the prosecution actually appealed; rather, they argued their case on the merits before the Court of Appeals. This makes sense: even with the possibility of prosecutorial appeal, the chance to be sentenced as a juvenile was their only option short of trial. Petitioners wanted a juvenile sentence, not a new trial. Petitioners, through counsel, gamed the system and attempted to withdraw their guilty pleas only after their juvenile sentences were rejected by the Court of Appeals. This post-conviction strategy gave petitioners two bites at the apple; that they now argue they would have given up their first (and *ex ante* more likely) bite because of the possibility of prosecutorial appeal defies credence.

Petitioners were very aware of the possible consequences of pleading guilty to first degree murder. Judge Roberson told them, before they pled, that they could possibly be sentenced as adults, and therefore be subject to a mandatory life sentence, as a result of their guilty pleas. That is exactly what happened, after the prosecutorial appeal. Petitioners knew the risk, and took their chances. The fact that they did not correctly assess whether or not

they actually would be sentenced as adults is wholly irrelevant. The plea was made voluntarily and with full knowledge of the possible consequences.

Moreover, AEDPA imposes additional constraints on the ability of federal courts to grant a writ of habeas corpus. In order to meet the gatekeeper standards set forth by AEDPA, 28 U.S.C. §§ 2254(d), for the issuance of writs of habeas corpus, the state court adjudication of the claim that is challenged on collateral appeal must have resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Ibid*; *Cone*, 122 S. Ct. at 1850.

The Supreme Court held in *Williams v. Taylor*, 529 U.S. 362 (2000), that "[t]he most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410 (emphasis in original). A state-court decision can involve an unreasonable application of United States Supreme Court precedent in only two ways. First, a state court might identify the correct legal rule, but unreasonably apply it to the facts. Second, a state-court decision might unreasonably extend a Supreme Court legal precedent to a new context where it should not apply or unreasonably refuse to extend that principle to a new context where it should apply. *Id.* at 406. The Supreme Court recently reiterated that the *Williams* objective unreasonableness standard applies to the ineffective assistance of counsel setting. *Cone*, 122 S. Ct. at 1850. In *Cone*, the Court held that when a state court correctly identifies the *Strickland* standard as applicable, and makes a reasonable judgment regarding attorney performance and prejudice under the correct standard, a federal court lacks the power to grant a writ of habeas corpus contravening that determination. *Id.* at 1853-54. I

would not hold that the Michigan court was objectively unreasonable in its judgment, even were I to disagree with it, as the majority does.

Judge Gilman's concurrence makes a number of interesting points that deserve a brief response. Contrary to the statement at page 24, I had thought that I did note, in the first paragraph of this dissent, and did not dispute the obvious facts in the record, that counsel did not inform their clients of the possibility of a government appeal. All of the counsel involved noted that they did not contemplate that such an appeal could occur or that it would be successful. In the *Miller* case on this appeal, Miller's counsel, and client, were in court when the prosecutor said that the state would appeal, and specifically testified that he felt that the chances of such an appeal succeeding (one had never been tried in Michigan, to this point) were sufficiently low that it did not affect their judgment.

Judge Gilman's interesting mathematical analysis at page 27 begins to address the correct inquiry, but does not go far enough. The relevant question is whether the ultimate advice was a strategy within the broad bounds of professional competence. Relatedly, we ask whether the decrease in the probability of a successful outcome due to prosecutorial appeal renders credible petitioners' assertions that they would have given up their chance at a juvenile sentence before Judge Roberson. The one counsel who testified specifically thought that the chances of the state succeeding on appeal were fairly small, and we have no basis for discounting that judgment. Thus, if counsel calculated the chances of Judge Roberson's sentencing the defendants as juveniles at 90% (when the reality turned out to be 100%), and believed the chance of success on appeal by the state to be 10%, contingent on the juvenile sentencing below, then the chances of ultimate success

would have shrunk from 90% to 81%. This might still look extremely good, as opposed to a very large probability of conviction of first degree murder and a sentence of life without parole.

While my assigning of values is just as speculative as Judge Gilman's, it does emphasize that the proper inquiry for effective assistance of counsel should be the overall strategy employed. It does not appear to me that we can properly say, under the AEDPA standard, that the state courts unreasonably applied *Strickland*.

Finally, I do not agree with Judge Gilman that the failure of the state court to *discuss* the prejudice prong of *Strickland* means that it did not correctly identify and apply *Strickland* as the governing federal rule. But even if we were to parse the two parts of *Strickland* in this way, we would not conduct a full *de novo* review, but rather a "independent" review as laid out in our recent case of *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000). There, we said, in a similar case: "That independent review, however, is not a full, *de novo* review of the claims, but remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA." *Ibid.* Thus, even in conducting an independent review we must determine more than simply that we believe the state court was wrong in its ultimate outcome.

As the above analysis of *Strickland*, *Williams*, and *Cone* shows, we can by no means term the judgment of the Michigan Court of Appeals unreasonable. The judgment is

perhaps debatable; if we ignore *Strickland's* clear requirements, we might say it was incorrect; under no circumstances can we say it was unreasonable.

Footnotes

*The Honorable Myron H. Bright, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

1 The Honorable Denise Page Hood, United States District Court Judge for the Eastern District of Michigan.

2 The court published only one opinion. *See Haynes v. Burke*, 115 F.Supp.2d 813 (E.D.Mich 2000). The other opinion is unpublished, *see Miller v. Straub*, No. 98-CV-74655-DT (E.D. Mich. Aug. 31, 2000), but the court analyzed the two cases similarly. In both cases, the district court ordered that, unless Michigan took action within 120 days to afford Miller and Haynes new trials, they could apply for writs ordering their forthwith release from custody.

3 Two of the four other boys faced trial on charges of first degree felony murder and assault with intent to rob while armed; they were found not guilty. Two boys pled guilty to second degree murder and assault with intent to rob while armed. They were sentenced as juveniles. Those juvenile sentences were upheld by the Michigan Court of Appeals. *People v. Brown*, 517 N.W.2d 806 (Mich. App. 1994).

4 Under Michigan law at that time, the trial court had discretion to determine whether juveniles convicted of first degree murder should be sentenced as juveniles or as adults. *See* Mich. Comp. Laws Ann. §§ 769.1 (1990). The Michigan legislature amended the statute in 1996 to remove this discretion. *See* Mich. Pub. Act 1996 No. 247. All

juveniles convicted of first degree murder are now mandatorily sentenced as adults. *See* Mich. Comp. Laws Ann. §§ 769.1(g) (2001).

[5] A 1988 amendment to Michigan statutory law granted Michigan prosecutors an appeal of right from "[a] final judgment or final order of the . . . recorder's court" in criminal cases. Mich. Comp. Laws Ann. §§ 770.12 (as amended, Mich. Pub. Act 1988 No. 66). In November 1989, the Michigan Court of Appeals published a decision in which it construed the amendment to allow prosecutors to appeal criminal sentences as of right. *People v. Reynolds*, 448 N.W.2d 774, 775 (Mich. App. 1989).

[6] The prosecutor appealed Haynes' sentence by right. The appeal in Miller's case was not as a matter of right because the prosecutor did not timely file the appeal. However, the Michigan Court of Appeals granted the prosecutor's application for leave to appeal.

[7] Haynes' trial counsel, Wilfred Rice, died before Haynes moved to withdraw his plea.

[8] Lyons also petitioned for a writ of habeas corpus in federal district court. In an opinion filed contemporaneously with this opinion, we have affirmed the grant of habeas corpus relief to Lyons by the district court. *See Lyons v. Jackson*, ___ F.3d ___ (6th Cir. 2002).

[9] In federal district court, Haynes alleged other grounds for ineffectiveness of counsel. That court, having granted relief based on Haynes' counsel's failure to advise him of the prosecutor's right to appeal, did not address those claims. *Haynes v. Burke*, 115 F.Supp.2d 813, 819-20 (E.D. Mich. 2000).

[10] The Supreme Court in *Williams* acknowledged the difficulty in defining the term "unreasonable," but

explained that "it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning." 529 U.S. at 410. This circuit has stated that we "rely solely on the Supreme Court's decision in *Williams* for the appropriate standard under §§ 2254(d)." *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000); *accord Miller v. Francis*, 269 F.3d 609, 614 & n.1 (6th Cir. 2001). Other circuit courts that have attempted greater clarification have come to widely divergent views on the meaning of "unreasonable." Compare *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000) (stating that an "unreasonable application" requires "[s]ome increment of incorrectness beyond error," but "the increment need not be great; otherwise, habeas relief would be limited to state court decisions 'so far off the mark as to suggest judicial incompetence'") (quoting *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 889 (3d Cir. 1999)); with *Kibbe v. Dubois*, 269 F.3d 26, 36 (1st Cir. 2001) ("[A] state court decision is objectively unreasonable under AEDPA only if it is so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes.") (internal quotation marks removed); and with *Delgado v. Lewis*, 223 F.3d 976, 981 (9th Cir. 2000) (equating an "unreasonable application" with "clear error," i.e., "a definite and firm conviction that an error has been committed").

[11] The court of appeals recognized that a determination of whether Miller's and Haynes' guilty pleas were made knowingly and voluntarily turned on whether their attorneys' advice was "within the range of competence demanded of attorneys in criminal cases." *Haynes (After Remand)*, 562 N.W.2d at 244, 250. This is the equivalent of the performance inquiry in *Strickland*. *See Hill*, 474 U.S. at 56, 58 (equating *Strickland*'s performance inquiry with consideration of whether counsel's advice was "within the

range of competence demanded of attorneys in criminal cases"). Because the Michigan Court of Appeals determined Miller's and Haynes' trial counsel performed adequately, it did not reach the questions whether Miller and Haynes each were prejudiced by deficient performance.

[12] The federal district court's opinion in Miller's case contains almost precisely the same wording. *Miller v. Straub*, No. 98-CV-74655-DT, Slip Op. at 13 (E.D. Mich. Aug. 31, 2000).

[13] In addition, Lusby entirely failed to consider that an appeals court, faced with the same two radically different sentencing possibilities as Chief Judge Roberson, might well reverse the trial court in favor of the more severe sentence.

[14] Citing the Supreme Court's recent decision in *Bell v. Cone*, 122 S.Ct. 1843 (2002), the dissent states that an attorney's legitimate trial tactics do not constitute deficient performance. A defense counsel's failure to consider a prosecutor's right to appeal is not a tactic or strategy. A defense counsel's failure to inform or advise the defendant regarding the state's right of appeal and the attendant chances of reversal is not a tactic or strategy. Such omissions of legal practice and legal counseling can never be a legitimate defense tactic or strategy.

[15] Warden Burke also argues that Haynes cannot show prejudice because, after learning that the prosecution had appealed his juvenile sentence, Haynes failed to request that the case be remanded to the trial court so that he could withdraw his plea. A defendant's decision not to abandon the appellate process in an effort to withdraw his guilty plea does not obviate prejudice to the defendant in pleading guilty as the decision to plead had already been made.

Moreover, the warden's contention is weakened because the case remained in the appeals court, not the trial court where withdrawal pleas must be made. Additionally, Haynes testified that his appellate counsel advised him there were other steps to be taken before they should consider withdrawing the plea.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CORTEZ MILLER,
Petitioner,

Civil No. 98-CV-74655-DT
v. HONORABLE DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

DENNIS STRAUB,

Respondent.

_____/

OPINION AND ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Cortez Miller, ("petitioner"), presently confined at the Cotton Correctional Facility in Jackson, Michigan, seeks the issuance of a writ of habeas corpus pursuant to 28 U.S.C. §§ 2254. In his application, filed through Susan M. Meinberg and Marla R. McCowan of the Michigan State Appellate Defender Office, petitioner challenges his conviction and sentence on one count of first degree felony murder, M.C.L.A. 750.316; M.S.A. 28.548, and one count of assault with intent to commit robbery while armed, M.C.L.A. 750.89; M.S.A. 28.284. For the reasons stated below, the petition for writ of habeas corpus is **CONDITIONALLY GRANTED.**

I. BACKGROUND

Petitioner was involved with several other defendants in the robbery and shooting death of Benjamin Gravel in Detroit, Michigan on February 8, 1990.[1] Although petitioner was sixteen years old at the time of the murder, he was charged as an adult under Michigan's automatic waiver statute. *See* M.C.L.A. 769.1; M.S.A. 28.1072.

On March 23, 1990, petitioner pleaded guilty as charged to first degree murder, assault with intent to commit robbery while armed, and to felony- firearm in front of Judge Dalton A. Roberson of the Detroit Recorder's Court.[2] At the time of the plea, the trial court advised petitioner and his mother several times that if he was sentence as an adult, he would face a mandatory sentence of life imprisonment without parole. The trial court further explained to petitioner and his mother that his only hope [for leniency] would be for him to be sentenced by the trial court as a juvenile. The prosecuting attorney also made it clear that there were no plea agreements between the Wayne County Prosecutor and petitioner and further indicated on the record that the prosecutor's office would be asking the trial court to sentence petitioner as an adult at the time of sentence.

On August 28, 1991, following a lengthy disposition hearing conducted pursuant to M.C.L.A. 769.1(3); M.S.A.

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[1] One of petitioner's co-defendants has a pending habeas case involving the same issue before this Court. *Kermit Haynes v. Luella Burke,* U.S.D.C. 98-73406.

[2] The felony-firearm conviction was later vacated by the Michigan Court of Appeals.

28.1072(3), petitioner was sentenced as a juvenile by the trial court and was committed to the Michigan Department of Social Services, to be confined until his twenty first birthday. In his closing argument at the disposition hearing, the prosecutor informed the trial court in petitioner's presence that if a juvenile sentence was imposed, the Wayne County prosecutor would appeal the sentence to the Michigan Court of Appeals.

The prosecutor appealed the sentence to the Michigan Court of Appeals, which reversed the trial court's sentence and ordered that petitioner be re-sentenced as an adult to life imprisonment without parole. *People v. Miller,* 199 Mich.App. 609, 503 N.W.2d 89 (1993) (Murphy, J. dissenting); *lv. den.* 445 Mich. 855, 519 N.W.2d 842 (1994).

Prior to the re-sentencing, petitioner filed a motion for relief from judgment pursuant to M.C.R. 6.500 *et. seq.*, which he later withdrew and re-filed as a motion to withdraw the guilty plea. The trial court scheduled an evidentiary hearing on petitioner's motion, which was to be heard prior to the re-sentencing. The prosecutor appealed the decision to conduct an evidentiary hearing prior to the re-sentencing. On December 7, 1994, the Michigan Supreme Court issued an order that petitioner be sentenced forthwith as an adult without prejudice to a subsequent consideration of his motion to withdraw his plea of guilty. *See People v. Miller,* 447 Mich. 1022, 527 N.W.2d 514 (1994). On December 17, 1994, petitioner was sentenced as an adult to life imprisonment without parole.

An evidentiary hearing was conducted on petitioner's motion to vacate his guilty plea on May 4, 1995. At the hearing, petitioner's trial counsel, Charles Lusby, admitted that his advice to petitioner to plead guilty for first-degree murder was "extraordinary," but indicated that he advised

petitioner to do so because he believed strongly that the trial court would sentence petitioner as a juvenile. Lusby indicated that after reviewing the evidence, he did not believe that there were any viable defenses other than jury nullification or abandonment. Lusby indicated that petitioner was fifteen years old when the case started and turned sixteen while the case was pending. Lusby further testified that because of his age, petitioner had relied "practically and totally" on counsel's advice to plead guilty.

Lusby admitted that in advising petitioner to plead guilty, he never considered the prosecuting attorney had the right to appeal the sentence imposed and further acknowledged that he never discussed the possibility that the prosecutor could appeal any juvenile sentence to a higher court with his client. Petitioner's attorney further admitted that his practice did not include appellate work. Lusby further recalled that at the time of the disposition hearing, the prosecutor informed the trial court that if petitioner were sentenced as a juvenile by the court, that the prosecutor would appeal the sentence. Lusby indicated that when the prosecutor indicated they would appeal any juvenile sentence, petitioner expressed some concern to him, but Lusby downplayed the concern, telling petitioner not to worry. After sentence was imposed, counsel never discussed with petitioner the fact that the prosecutor could or would appeal.

Petitioner testified that he was fifteen years old at the time of his arrest and was a year behind in school. Petitioner indicated that his attorney told him to plead guilty because counsel thought his chances at trial were slim. Although counsel did not guarantee to him what the sentence would be, it was petitioner's understanding from his conversations with Lusby that if he pleaded guilty, he would be sentenced to training school. Petitioner also indicated that had he known

that the trial court's sentencing decision was not final but could be appealed by the prosecuting attorney, he never would have pleaded guilty.

Petitioner also refuted the factual basis of his guilty plea, indicating that counsel had told him what to say so that the trial court could accept his plea of guilty. Specifically, petitioner indicated that he had no desire to participate in the robbery and did not anticipate that anyone would be shot. Although acknowledging that he had given his grandfather's pistol to co-defendant Kermit Haynes, petitioner claims that he had given it to Haynes because he was scared and because he was not having a gun in his possession.

On October 24, 1995, the trial court issued an opinion and order permitting petitioner to withdraw his plea of guilty. In so ruling, the trial court noted that trial counsel had given petitioner extraordinary advice to plead guilty without giving consideration to the prosecutor's appeal rights to noted that advised petitioner to plead guilty without giving consideration to the prosecutor's appeal rights. The trial court also noted that petitioner was fifteen years old and in ninth grade at the time of the proceedings and claimed his innocence to the offense. The trial court further found that defense counsel's performance, which suggested promises of leniency or incorrect statements of law, was ineffective because petitioner was never informed that the prosecutor could appeal his sentencing as a juvenile. Finding the plea to have been involuntarily made as the result of counsel's defective performance, the trial court permitted the plea to be withdrawn. *People v. Miller,* Detroit Recorder's Court # 90-2571, Opinion and Order dated October 24, 1995.

The prosecuting attorney appealed the trial court's decision to the Michigan Court of Appeals. In a consolidated appeal involving several automatically waived juveniles,

including petitioner's co-defendant Kermit Haynes, the Michigan Court of Appeals reversed the trial court's decision and re-instated the conviction. In so doing, the Michigan Court of Appeals concluded that trial counsel's failure to inform petitioner that the prosecution could appeal the trial court's decision to sentence petitioner as a juvenile did not constitute ineffective assistance of counsel. *People v. Haynes,* 221 Mich.App. 551, 562 N.W.2d 241; 221 Mich.App. 551, 562 N.W.2d 241 (1997); *lv. den.* 456 Mich. 945, 575 N.W.2d 561 (1998).

Petitioner now seeks the issuance of a writ of habeas corpus on the following ground:

> I. PETITIONER'S GUILTY PLEA TO FIRST DEGREE MURDER WAS INVOLUNTARY, UNKNOWING, AND UNINTELLIGENT AS A RESULT OF THE INEFFECTIVE ASSISTANCE OF COUNSEL IN THE TRIAL COURT.

II. STANDARD OF REVIEW

The provisions of the Antiterrorism and Effective Death Penalty Act "A.E.D.P.A.", Pub.L. No. 104-132, 110 Stat. 1214 (Apr. 26, 1996) govern this case because Petitioner filed his habeas application after the effective date of the AEDPA. *Lindh v. Murphy,* 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). The Act altered the standard of review that a federal court must use when reviewing applications for writs of habeas corpus. 28 U.S.C. §§ 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §§ 2254(d); *Harpster v. State of Ohio,* 128 F.3d 322, 326 (6th Cir.1997).

A federal court must apply the presumption of correctness to state court findings of fact for habeas corpus purposes unless convincing evidence is offered to rebut this presumption. 28 U.S.C. §§ 2254(e)(1).

With respect to the "contrary to" clause, there are two situations in which a state court decision will be contrary to clearly established federal law. First, a state court decision

will clearly be contrary to the Supreme Court's clearly established precedent if the state court applies a rule that contradicts the governing law set forth in the Supreme Court's cases. Second, a state-court decision would also be contrary to the Supreme Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from the Supreme Court precedent. *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 1519-1520, 146 L.Ed.2d 389 (2000). On the other hand, a "run-of-the-mill state-court decision" which applied the correct legal rule from the Supreme Court's cases to the facts of a petitioner's cases would not fit comfortably within the "contrary to" clause in §§ 2254(d)(1). *Id.* at 1520. These cases should be reviewed under the "unreasonable application" language of §§ 2254(d)(1).

A federal habeas court making the "unreasonable application" inquiry must ask whether the state court's application of clearly established federal law was objectively unreasonable. *Williams v. Taylor,* 529 U.S. at ----, 120 S.Ct. at 1521. Although the term unreasonable is difficult to define, it is a common term in the legal world, and federal judges are familiar with its meaning. An unreasonable application of federal law is different from an incorrect application of federal law. Thus, a federal habeas court may not issue a writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, the application must also be unreasonable. *Id.* at 1522.

Finally, the term "clearly established federal law" refers to the holdings as opposed to the dicta of the U.S.

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Supreme Court's decisions at the time of the relevant state court decisions. *Williams v. Taylor,* 529 U.S. at ----, 120 S.Ct. at 1523. With the AEDPA, Congress limited the source of law for federal habeas relief to cases decided by the U.S. Supreme Court. *Herbert v. Billy,* 160 F.3d 1131, 1135 (6th Cir.1998). However, to the extent that lower or inferior federal courts have decided factually similar cases, references to these decisions by a federal habeas court is appropriate or relevant in determining whether the state court's application of U.S. Supreme Court law was reasonable or unreasonable. *Hull v. Kyler,* 190 F.3d 88, 104 (3rd Cir.1999); *Atley v. Ault,* 191 F.3d 865, 871 (8th Cir.1999); *O'Brien v. Dubois,* 145 F.3d 16, 25 (1st Cir.1998); *Keller v. Larkins,* 89 F.Supp.2d 593, 599 (E.D.Pa.2000); *United States ex. rel. Gooch v. McVicar,* 953 F.Supp. 1001, 1006 (N.D.Ill.1997).

III. DISCUSSION

An ineffective assistance of counsel claim presents a mixed question of law and fact and is subject to *de novo* review. *Combs v. Coyle,* 205 F.3d 269, 278 (6th Cir.2000); *Groseclose v. Bell,* 130 F.3d 1161, 1164 (6th Cir.1997). Because an ineffective assistance of counsel claim is a mixed question of law and fact, it is not subject to the statutory presumption of correctness attending state court findings of fact. *Sims v. Livesay,* 970 F.2d 1575, 1579 (6th Cir.1992).

To show that he or she was denied the effective assistance of counsel under federal constitutional standards, a defendant must demonstrate that, considering all of the circumstances, counsel's performance fell below the objective standard of reasonableness and so prejudiced defendant that he or she was denied a fair trial and a reasonable probability exists that, but for counsel's conduct, the result would have been different. *Strickland v. Washington,* 466 U.S. 668, 669,

694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Judicial scrutiny of counsel's performance must be highly deferential. Courts presume that an attorney is competent and the burden rests upon the defendant to show a constitutional violation. *United States v. Pierce,* 62 F.3d 818, 833 (6th Cir.1995). A strong presumption exists that counsel's behavior lies within the wide range of reasonable professional assistance. *O'Hara v. Wigginton,* 24 F.3d 823, 828 (6th Cir.1994). Petitioner must also overcome the presumption that under the circumstances, the challenged action might be sound trial strategy. *Strickland,* 466 U.S. 668 at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674.

In claiming ineffective assistance of counsel in the context of a guilty plea, a defendant must show that his or her counsel's performance was deficient and that the deficient performance caused the defendant to reach a different decision regarding his or her plea of guilty. *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Nagi v. United States,* 90 F.3d 130, 134-135 (6th Cir.1996); *O'Hara v. Wigginton,* 24 F.3d at 828; *Richardson v. Elo,* 974 F.Supp. 1100, 1104 (E.D.Mich.1997) (Gadola, J.). Therefore, to satisfy the 'prejudice' prong of the standard for evaluating ineffective assistance of counsel claims under *Strickland* in the context of a guilty plea, the defendant must show that, but for counsel's errors, he or she would not have pleaded guilty but would have insisted on going to trial. *Hill v. Lockhart,* 474 U.S. at 58-59, 106 S.Ct. 366; *See also Warner v. United States,* 975 F.2d 1207, 1214 (6th Cir.1992) (prejudice is proven if defendant shows a reasonable probability that but for counsel's defective advice, he would not have pleaded guilty).

In the present case, the Michigan Court of Appeals determined that trial counsel was not ineffective for failing to

advise petitioner that the prosecutor could appeal any juvenile sentence imposed by the trial court. In so ruling, the Michigan Court of Appeals noted that petitioner was made aware at the time he pleaded guilty to the first degree murder charge that he faced a mandatory sentence of life imprisonment without parole if sentenced as an adult. The Michigan Court of Appeals further found that petitioner was made aware at the time of the disposition hearing that they intended to appeal any juvenile sentence imposed. The Michigan Court of Appeals concluded that petitioner understood the consequences of pleading guilty to first degree murder but waited to until after the Michigan Court of Appeals ordered him to be re-sentenced as an adult to move to withdraw his guilty plea. *People v. Haynes,* 221 Mich.App. at 561-562, 562 N.W.2d 241.

In reviewing this case *de novo,* this Court concludes that the Michigan Court of Appeals' determination that petitioner received effective assistance of counsel when he pleaded guilty was an unreasonable application of the standards enunciated in *Strickland v. Washington and Hill v. Lockhart.* Trial counsel's failure to discuss with petitioner the fact that the prosecutor could appeal the imposition of a juvenile sentence to a higher court and have it overturned amounted to ineffective assistance of counsel and rendered petitioner's plea involuntary.

In *Wogan v. United States,* 846 F.Supp. 135, 140-143 (D.Me.1994), the district court found that defense counsel rendered ineffective assistance of counsel by advising petitioner to waive his right to testify at a sentencing hearing to challenge the amounts of heroin used to score petitioner's relevant conduct under the federal sentencing guidelines, because counsel failed to inform petitioner that the

government could appeal the district court's downward departure sentence and obtain a re-sentencing involving a higher amount of heroin used to determine the relevant conduct for determining petitioner's sentencing guidelines range.

Similarly, in *State v. Goforth,* 130 N.C.App. 603, 503 S.E.2d 676, 678 (N.C.App.1998), the North Carolina Court of Appeals held that a trial counsel's misadvice about the appealability of a defendant's sentence was deficient within the meaning of the first prong of the two-part *Strickland* test. Although *Goforth* involved incorrect advice given by a defense attorney about the defendant's ability to appeal her sentence to a higher court, this Court believes that the holding in that case can be extended to this situation where petitioner's attorney failed to advise petitioner that the Wayne County Prosecutor could appeal any juvenile sentence imposed by the trial court.

Under the circumstances, this Court concludes that counsel's lack of advice on the appealability of petitioner's sentence by the prosecuting attorney amounted to deficient performance within the meaning of the *Strickland* standard for ineffective assistance of counsel.

In reinstating petitioner's conviction, the Michigan Court of Appeals placed great emphasis on the fact that the prosecuting attorney informed the trial court, defense counsel, and petitioner on the record at the disposition hearing that they intended to appeal any juvenile sentence imposed. However, the Michigan Court of Appeals ignored Lusby's testimony that at the time this statement was made, petitioner expressed concern to him about the prosecutor's expressed

intent to appeal any juvenile sentence, but that Lusby downplayed this statement and told him not to worry about it. Lusby also indicated that there was no further discussion, evan after petitioner was sentenced as a juvenile, about the prosecutor's right to appeal the sentence imposed. Although the prosecutor may have indicated an intent by his office to appeal any juvenile sentence imposed, petitioner was represented by Mr. Lusby, and not the prosecuting attorney. As Lusby indicated at the evidentiary hearing, petitioner was totally reliant on his advice because of his age. In light of the fact that petitioner's own attorney told him not to worry about any appeal by the prosecutor of any sentence imposed, it would be unreasonable to expect petitioner to move at the time of sentencing to withdraw his guilty plea.

In reversing the trial court, the Michigan Court of Appeals also ignored petitioner's age and educational level in determining whether his plea had been entered into voluntarily. The determination of whether a defendant's guilty plea was voluntarily and intelligently made must be based upon a comprehensive examination of the totality of the circumstances, rather than any particular record inquiry. *Berry v. Mintzes,* 726 F.2d 1142, 1146 (6th Cir.1984). Because petitioner was fifteen years old and was in the ninth grade when he pleaded guilty, this Court concludes that petitioner's trial counsel had a "particularly stringent duty" to make certain that petitioner understood the charges that he was pleading guilty to, as well as the consequences of the plea. *Rinehart v. Brewer,* 561 F.2d 126, 130 (8th Cir.1977). This would include advising petitioner that under Michigan law, the prosecutor could appeal a juvenile sentence with the very real possibility, as occurred here, that an appellate court would reverse the juvenile disposition leaving the trial court with the sole option of imposing a mandatory sentence of life imprisonment without parole.

This Court agrees with the Detroit Recorder's Court that it was "extraordinary advice" on the part of counsel to recommend to a fifteen year old defendant with a ninth grade education that he plead guilty to an offense for which the sole penalty in the adult criminal justice system would be a nonparolable life sentence. In light of the nature of the adult penalties here, this Court concludes that trial counsel's performance was deficient within the meaning of the *Strickland* standard where he failed to advise petitioner that the prosecutor could appeal a juvenile sentence to a Michigan appellate court with the very real possibility that a higher court would order petitioner resentenced as an adult. Because of petitioner's young age, petitioner was totally reliant on his attorney's advice to plead guilty to the offenses in this case. In light of what amounted to extraordinary advice by counsel that petitioner plead guilty to an offense which carried a mandatory sentence of life imprisonment without parole, counsel had a duty both to consider and to advise petitioner of the prosecutor's right to appeal any sentence to the Michigan appellate courts, with the possibility that petitioner's juvenile sentence would be overturned on appeal and he would then have to serve a nonparolable life sentence.

This Court concludes that petitioner has demonstrated that his trial counsel was deficient. Petitioner has also satisfied the "prejudice" prong of the *Hill v. Lockhart* standard. Petitioner testified that had he known that the trial court's juvenile sentence was not a final disposition but could be appealed to a higher court, he would not have pleaded guilty. In light of the fact that petitioner pleaded guilty to an offense which normally carries a mandatory nonparolable life sentence, he has shown a reasonable probability that had he known that the prosecutor could appeal the imposition of a

juvenile sentence, thus leaving the trial court with only the severest sentencing option available in the State of Michigan, he would not have pleaded guilty.

This Court determines that because of the ineffective assistance of counsel, petitioner's plea of guilty was not made knowingly or voluntarily. A plea of guilty must be knowingly and voluntarily made. The defendant must be aware of the "relevant circumstances and likely consequences" of his plea. *Hart v. Marion Correctional Institution,* 927 F.2d 256, 257 (6th Cir.1991). Because petitioner was never informed that one of the relevant circumstances of plea of guilty to a first degree murder charge, which was done with the hope of receiving a juvenile sentence, could be the prosecutor appealing such a juvenile sentence, this Court concludes that petitioner's plea of guilty was involuntarily made, particularly in light of petitioner's young age at the time of the plea. The Court will therefore conditionally grant a writ of habeas corpus, ordering the State of Michigan to either take action to afford petitioner a new trial within one hundred and twenty (120) days of the date of this order or release petitioner. *Hart,* 927 F.2d at 259.

IV. ORDER

IT IS HEREBY ORDERED THAT PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS IS CONDITIONALLY GRANTED. UNLESS THE STATE TAKES ACTION TO AFFORD PETITIONER A NEW TRIAL WITHIN ONE HUNDRED AND TWENTY (120) DAYS OF THE DATE OF THIS OPINION, HE MAY APPLY FOR A WRIT ORDERING RESPONDENT TO RELEASE HIM FROM CUSTODY FORTHWITH.

_____

HONORABLE DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

Dated:_____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CORTEZ MILLER,

Petitioner,

Civil No. 98-CV-74655-DT
v. HONORABLE DENISE PAGE HOOD

DENNIS STRAUB,

Respondent.
_____/

JUDGMENT

This action having come before the Court on a Petition for Writ of Habeas Corpus, and the Court having entered an Opinion and order Granting Petition for Writ of Habeas Corpus,

Accordingly,

Judgment is entered in favor or Petitioner and against Respondent.

DAVID J. WEAVER
CLERK OF COURT

Approved: By:_____
Deputy Clerk

_____

DENISE PAGE HOOD
United States District Judge

Dated:
Detroit, Michigan

APPENDIX D

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant/Cross-Appellee

FOR PUBLICATION
February 14, 1997
9:15 a.m.

v.

No. 190360
Recorder's Court
LC 90-002571

KERMIT ELDRIDGE HAYNES,

Defendant-Appellee/Cross-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant/Cross-Appellee

FOR PUBLICATION
February 14, 1997
9:15 a.m.

v.

No. 190361
Recorder's Court
LC 90-002571

CORTEZ MILLER,

Defendant-Appellee/Cross-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant/Cross-Appellee

FOR PUBLICATION
February 14, 1997
9:15 a.m.

v.

No. 190366
Recorder's Court
LC 90-000321

DESHAUN LYONS, a/k/a DESHAWN LYONS,

Defendant-Appellee/Cross-Appellant.

Before Jansen, P.J. and Saad and M.D. Schwartz,* JJ.

JANSEN, P.J.

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* Circuit judge, sitting on the Court of Appeals by assignment.

In these consolidated appeals, the Wayne County Prosecutor appeals by leave granted from October 23, 1995, orders of the Detroit Recorder's Court granting these defendants' motions to withdraw their guilty pleas. Defendant Kermit Haynes has also filed a cross appeal. We reverse the trial court's orders granting defendants' motions to withdraw their guilty pleas.

The facts of these cases have been adequately set forth in the prior decisions of this Court and we see no need to reiterate them here. See *People v. Haynes,* 199 Mich.App.

593, 502 N.W.2d 758 (1993); *People v. Miller,* 199 Mich.App. 609, 503 N.W.2d 89 (1993); *People v. Lyons (On Remand),* 203 Mich.App. 465, 513 N.W.2d 170 (1994). However, a full recitation of the procedural history is necessary in order to resolve these appeals. We will address each defendant's appeal separately.

No. 190360

Kermit Eldridge Haynes, born July 8, 1973, was involved in the shooting death of Benjamin Gravel on February 8, 1990. Haynes, along with five other young men, spent that evening attempting to steal a car at gunpoint because they wanted a car to go to a party. Haynes was the one who actually shot and killed Gravel that night. Haynes was charged with first-degree murder, M.C.L. §§ 750.316; M.S.A. §§ 28.548, assault with intent to rob while armed, M.C.L. §§ 750.89; M.S.A. §§ 28.284, and possession of a firearm during the commission of a felony, M.C.L. §§ 750.227b; M.S.A. §§ 28.424(2). He pleaded guilty as charged on March 27, 1990, and the matter was set for a juvenile sentencing hearing before Detroit Recorder's Court Judge Dalton A. Roberson. Following the hearing, Judge Roberson sentenced Haynes as a juvenile and ordered that he be placed with the Michigan Department of Social Services until the age of twenty-one.

The prosecution appealed that ruling, arguing that the trial court abused its discretion in sentencing Haynes as a juvenile. This Court agreed, reversed the trial court's ruling, and remanded with instructions to sentence Haynes as an adult. *Haynes, supra,* p. 594, 502 N.W.2d 758. Haynes sought to appeal to the Supreme Court, but leave was denied on April 8, 1994. 445 Mich. 855, 519 N.W.2d 842 (1994). The case was returned to the trial court and sentencing was scheduled for June 8, 1994. However, on June 8, 1994,

Haynes filed a motion for relief from judgment pursuant to MCR 6.508(D). Haynes later withdrew his motion for relief from judgment and, on July 1, 1994, he filed a motion to withdraw his guilty plea and for an evidentiary hearing. Haynes claimed that he was entitled to withdraw his guilty plea because it was not made voluntarily, knowingly, and understandingly, because he was denied the effective assistance of counsel, and because he was denied due process.

On September 14, 1994, the trial court granted Haynes' motion for an evidentiary hearing. The prosecution sought leave to appeal in this Court, but the Court, White, P.J., and Hood, J. (Corrigan, J., dissenting), denied leave to appeal in an unpublished order entered on November 21, 1994 (Docket No. 178974). The prosecution then sought leave to appeal in the Supreme Court, and the Supreme Court, in lieu of granting leave to appeal, vacated the trial court's order of September 14, 1994, and further directed that Haynes be sentenced as an adult, but without prejudice to subsequent consideration of the motion to withdraw the guilty plea or motions for other relief that Haynes might pursue. 447 Mich. 1021, 527 N.W.2d 512 (1994).

The case was returned to the trial court, and on December 19, 1994, Haynes was sentenced as an adult to the mandatory term of life imprisonment without the possibility of parole for first-degree murder. The trial court then held an evidentiary hearing regarding Haynes' motion to withdraw his guilty plea on April 13, 1995. Following the hearing, the trial court granted Haynes' motion to withdraw his guilty plea. The prosecution applied for leave to appeal, which was granted by this Court on February 1, 1996.

The prosecution contends that the trial court abused its discretion in granting Haynes' motion to withdraw his guilty plea. The trial court applied MCR 6.310(B) (withdrawal of plea before sentence) in deciding the motion. The prosecution contends that the trial court should have applied MCR 6.311 (challenging plea after sentence). We agree with the prosecutor in this regard.

The trial court sentenced Haynes as a juvenile on August 28, 1991. Although the prosecutor has appealed the propriety of sentencing Haynes as a juvenile, Haynes has, at all times during the pendency of these appeals, been under sentence. Further, this Court's first opinion in *Haynes* reversed the trial court's decision to sentence Haynes as a juvenile and remanded for him to be sentenced as an adult. We cannot agree with Haynes' claim that the Supreme Court's order of December 7, 1994, vacated his sentence such that the case is in a presentence posture and MCR 6.310(B) applies. The Supreme Court's order directed that the Recorder's Court order of September 14, 1994 (granting Haynes an evidentiary hearing regarding his motion to withdraw his guilty plea) be vacated. The Supreme Court further directed that Haynes be "sentenced as an adult forthwith, ... but without prejudice to subsequent consideration of the motion to withdraw the plea of guilty or motions for other relief which the defendant might pursue." 447 Mich. at 1021-1022, 527 N.W.2d 512. The Supreme Court's order cannot be read as vacating Haynes' sentence so that the case was placed in a presentence posture when he moved to withdraw his guilty plea.

Based on the procedural history of this case, logic dictates that Haynes moved to withdraw his guilty plea *after* sentencing. Here, the trial court had sentenced Haynes, although as a juvenile, and the appellate issues have all related to the propriety of sentencing him as a juvenile rather

than as an adult. Therefore, we conclude that the trial court erred in applying MCR 6.310(B) to Haynes' motion to withdraw his guilty plea. The proper court rule to apply in this case is MCR 6.311, which controls the challenge of a plea after sentencing and we will apply MCR 6.311 in this case.

After a plea has been accepted by the trial court, there is no absolute right to withdraw the plea. *People v. Eloby (After Remand)*, 215 Mich.App. 472, 474, 547 N.W.2d 48 (1996). When a motion to withdraw a plea is made after sentencing, the decision whether to grant it rests within the discretion of the trial court. *Id.*, p. 475, 547 N.W.2d 48. That decision will not be disturbed on appeal unless there is a clear abuse of discretion resulting in a miscarriage of justice. *Id.*

Haynes primarily contends, and the trial court agreed, that he was denied the effective assistance of counsel because trial counsel did not explain to him that the prosecution had the right to appeal his sentence if the trial court decided to sentence him as a juvenile. Thus, Haynes claims that he did not fully understand the ramifications of pleading guilty of first- degree murder because the appellate courts could reverse the trial court's decision and order that he be sentenced as an adult. Therefore, it is Haynes' claim that his plea was not made knowingly, voluntarily, or understandingly.

In reviewing a claim of ineffective assistance of counsel arising out of a guilty plea, the courts should focus on whether the defendant's plea was made voluntarily and understandingly. *In re Oakland Co. Prosecutor*, 191 Mich.App. 113, 120, 477 N.W.2d 455 (1991). Whether a plea is unintelligently made depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases, not on whether counsel's advice

was right or wrong. *Id.*, p. 122, 477 N.W.2d 455. Further, requests to withdraw pleas are generally regarded as frivolous where the circumstances indicate that the defendant's true motivation for moving to withdraw is a concern regarding sentencing. *People v. Holmes*, 181 Mich.App. 488, 492, 449 N.W.2d 917 (1989). Indeed, this Court has stated that counsel's incorrect prediction concerning a defendant's sentence and the prosecutor's role in sentencing is not enough to support a claim of ineffective assistance of counsel. *In re Oakland Co. Prosecutor, supra*, p. 124, 477 N.W.2d 455. More recently, this Court "decline[d] to hold that a guilty plea to first-degree murder is per se proof that [a] defendant received ineffective assistance of counsel." *People v. Effinger*, 212 Mich.App. 67, 71, 536 N.W.2d 809 (1995).

Haynes claims that his counsel did not advise him that the prosecutor had the right to appeal his sentence if he was sentenced as a juvenile. However, the record indicates that Haynes was well aware of the sentencing consequences at the time of the plea hearing. The plea hearing in this case was conducted on March 27, 1990. Defendant's trial counsel, Wilfred Rice, the prosecutor, Marc Hart, Judge Roberson, and defendant were present at the plea hearing, and the following occurred:

> Mr. Rice: Your Honor, for the record, my name is Wilfred C. Rice. I have talked with Mr. Haynes and his family at length about the matter before the court today and it is his desire and with the acquiescence of the father, that he enter a plea of guilty as charged to murder in the first degree and felony firearm, assault with intent to rob being armed.

I have explained to him the possible punishments that are involved in all of the charges before the court, the fact that he could be sentenced as an adult to natural life without parole.

THE COURT: You also explained to him that's the only hope he's got?

MR. RICE: Right.

THE COURT: Because Mr. Hart also indicated, which should put him on formal notice, that he is going to make a recommendation to him as to the other defendant. He wants a day long hearing or there about, for the purpose of trying to convince me that he should be treated as an adult. Does he understand that?

MR. RICE: Yes, I explained that the court has the discretion to consider him for sentencing as an adult or as a juvenile.

THE COURT: If he is sentenced as an adult he has no hope.

MR. RICE: That's right.

THE COURT: Okay.

MR. RICE: That's his understanding.

THE COURT: He wants to take that chance?

MR. RICE: Yes, sir, we want to take that chance.

The Court: Mr. Hart?

MR. HART: Judge, my only concern quite frankly I think that by taking a plea to murder one the defense is setting up the scenario that if you decide to sentence him as an adult and he goes to the adult facility this will get reversed as an ineffective plea.

THE COURT: Why is that?

MR. HART: I don't think you can responsibly plead somebody to first degree murder.

MR. RICE: That's not what the law says. The law says that at an arraignment a defendant can plead to whatever he wants to.

The trial court then proceeded to inform Haynes of the possible punishments for first-degree murder, assault with intent to rob while armed, and felony- firearm. The trial court specifically informed Haynes that first-degree murder is punishable by a mandatory term of life imprisonment and is not parolable. At the plea hearing, Haynes stated that no

one was forcing him to plead guilty, that he was pleading guilty freely, understandingly, and voluntarily, that his counsel had explained to him the possible sentences, that no one promised him that the judge would be lenient, and that he had discussed his guilty plea with his parents. Haynes then established the factual basis for the plea.

Therefore, the record clearly indicates that Haynes was aware that he could be sentenced as an adult to a mandatory term of life imprisonment without the possibility of parole as early as the plea hearing. Yet, knowing that he faced the possibility of being thus sentenced, Haynes still pleaded guilty of first-degree murder and did not move to withdraw his guilty plea until after the appellate process. The record indicates that counsel explained the consequences of pleading guilty of first-degree murder and that defendant's plea was made knowingly, understandingly, and voluntarily. *Effinger, supra,* pp. 70-71, 536 N.W.2d 809.

Moreover, we note that trial counsel's strategy *worked.* Trial counsel advised Haynes to plead guilty, believing that he could convince the trial court to sentence Haynes as a juvenile, which the trial court did. The fact that the appellate courts have ordered that Haynes be sentenced as an adult does not render trial counsel's strategy to constitute ineffective assistance of counsel. Under the circumstances of this case, we decline to hold that trial counsel's failure to inform Haynes that the prosecutor could appeal the trial court's sentencing decision constituted ineffective assistance of counsel.[1]

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[1] We assume for purposes of defendant Haynes' appeal that defense counsel did not inform him that the prosecutor could appeal the trial court's sentencing decision. At the time of the evidentiary hearing, Haynes' trial counsel was

Haynes was fully aware of the consequences of pleading guilty of first-degree murder at the time of the plea hearing.

With regard to the trial court's conclusions that trial counsel's performance suggested promises of leniency or incorrect statements of the law, the record does not support such conclusions. Courts generally will reject assertions that promises of leniency were made where, as here, the defendant has sworn on the record that no such promises were made. *People v. Jackson,* 203 Mich.App. 607, 612, 513 N.W.2d 206 (1994). Further, there is no record support for Haynes' postsentencing allegation that such a promise was made. See *id.*, pp. 612-613, 513 N.W.2d 206. Trial counsel's statements at the plea hearing show that Haynes was informed that by pleading guilty he faced a prison term of life without the possibility of parole. There is simply no indication that trial counsel informed Haynes of incorrect statements of the law or promised leniency, as evidenced by the remarks made at the plea hearing.

Finally, the trial court's conclusion that the plea withdrawal was also supported by Haynes' claim of innocence is wrong. Haynes established the factual basis for the plea in March 1990 and stated on the record that he shot at Gravel. It was not until after the appellate process and five years after tendering his guilty plea that Haynes claimed his innocence

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deceased and could not testify with regard to this matter. Haynes testified that his trial counsel had not informed him that the prosecutor could appeal the trial court's sentencing decision. However, Haynes knew that he faced the possibility of a life without parole sentence at the time that Judge Roberson was to sentence him.

regarding these charges. The timing of Haynes' claim, coupled with the fact that he clearly established a factual basis for the plea in March 1990, certainly indicate that the trial court's finding that his testimony at the hearing where he moved to withdraw the guilty plea supported his claim of innocence is clearly erroneous. Despite its effort to do so, the trial court could not insulate its factual findings from review under the guise of a credibility determination where prior record evidence is directly contrary to Haynes' current claim of "innocence." *Beason v. Beason,* 435 Mich. 791, 804, 460 N.W.2d 207 (1990). Here, in reviewing the entire record and in considering the timing of Haynes' claim, the trial court's finding that Haynes' claim of innocence at the evidentiary hearing supported the motion to withdraw the guilty plea is clearly erroneous because such a claim is implausible. *Id.,* p. 803, 460 N.W.2d 207. Accordingly, we conclude that Haynes' guilty plea was tendered knowingly, understandingly, and voluntarily. There was no error in the plea proceeding to justify setting aside defendant's guilty plea under MCR 6.311. *People v. Montrose (After Remand),* 201 Mich.App. 378, 380, 506 N.W.2d 565 (1993). The trial court clearly abused its discretion in granting defendant's motion to withdraw his guilty plea.

In his cross appeal, Haynes raises the additional issue that the trial court erred in limiting the scope of the evidentiary hearing. Haynes also claims that trial counsel was ineffective in failing to move to suppress his statement to the police. However, these issues are waived for appellate review because of defendant's unconditional guilty plea. *People v. Vonins (After Remand),* 203 Mich.App. 173, 175-176, 511 N.W.2d 706 (1993).

Cortez Miller, born April 4, 1974, was also one of six young men involved in the shooting death of Benjamin Gravel on February 8, 1990. Miller pleaded guilty as charged on March 23, 1990, of first-degree murder, assault with intent to rob while armed, and felony-firearm. Following a juvenile sentencing hearing, Judge Roberson sentenced Miller as a juvenile and ordered that he be placed with the Department of Social Services until the age of twenty-one. The prosecutor appealed Judge Roberson's decision to sentence Miller as a juvenile, and this Court reversed the decision and ordered that the adult sentence be imposed. See *Miller, supra,* p. 610, 503 N.W.2d 89. Miller sought leave to appeal to the Supreme Court and leave was denied on April 8, 1994. 445 Mich. 855, 519 N.W.2d 842 (1994).

Sentencing as an adult in the trial court was set for June 8, 1994, but Miller filed a motion for relief from judgment. Miller later withdrew this motion, but on July 1, 1994, he filed a motion to withdraw his guilty plea. Judge Roberson issued an order granting an evidentiary hearing on September 14, 1994. The prosecution sought leave to appeal to this Court, but leave was denied on November 21, 1994. The prosecutor then sought leave to appeal to the Supreme Court, and the Supreme Court, in lieu of granting leave to appeal, vacated Judge Roberson's order and ordered that Miller be sentenced as an adult "forthwith," but without prejudice to subsequent consideration of the motion to withdraw the guilty plea or motions for other relief. 447 Mich. 1022, 527 N.W.2d 514 (1994). On December 19, 1994, Judge Roberson sentenced Miller as an adult to the mandatory term of life imprisonment without the possibility of parole.

On May 4, 1995, an evidentiary hearing was conducted regarding Miller's motion to withdraw his guilty plea. On October 23, 1995, the trial court granted Miller's motion to withdraw his guilty plea on the basis of ineffective assistance of counsel. The prosecution filed an application for leave to appeal, and this Court granted leave on February 1, 1996.

For the same reasons set forth in Docket No. 190360, we find that the trial court erred in applying MCR 6.310(B). The correct court rule to apply was MCR 6.311 because Miller moved to withdraw his guilty plea after sentencing. The trial court originally sentenced Miller as a juvenile on June 17, 1991, and he has at all times been under sentence since that date. The only issue has been the propriety of sentencing Miller as a juvenile.

Defendant Miller's argument on appeal is the same as Haynes' argument. Miller claims that trial counsel never informed him that the prosecutor had the right to appeal the sentencing decision if the trial court decided to sentence him as a juvenile. Contrary to Miller's argument, we find that he knowingly, understandingly, and voluntarily tendered his plea and that no error occurred in the plea proceeding. Accordingly, the trial court clearly abused its discretion in granting Miller's motion to withdraw his guilty plea.

Defendant, defendant's mother, defendant's trial counsel, Charles Lusby, the prosecutor, Marc Hart, and Judge Roberson were all present at the plea hearing on March 23, 1990. The following occurred:

MR. LUSBY: Your Honor, Mr. Miller would like to withdraw his plea of not guilty to murder in the first degree felony murder, assault with intent to rob being armed and felony firearm and tender a plea of guilty to those charges. There have not been any agreements made with the prosecution. Mr. Hart has said that their office is going to recommend that Mr. Miller be sentenced as an adult. We have not agreed to that. That is his recommendation. He has a right to recommend that.

MR. HART: Could I say something before we start taking the plea?

THE COURT: Sure.

MR. HART: I just want the defendant to be absolutely stone cold aware as to what is going on. He is pleading guilty to first degree murder.

THE COURT: Mandatory life imprisonment, do you understand that?

MR. MILLER: Yes.

THE COURT: The only hope that you got if I am convinced to treat you as a juvenile for the purpose of disposition, do you understand that?

MR. MILLER: Yes, sir.

THE COURT: Okay. Are any of the parents in court?

MR. LUSBY: The mother.

THE COURT: This has been discussed with you?

MRS. MILLER: Yes.

THE COURT: You want him to do this--well, you don't have any choice, but I want you to know.

MRS. MILLER: I understand he has with you that you might do it as a juvenile and you might do it as an adult.

THE COURT: If I do it as an adult he's got no hope.

MRS. MILLER: Right.

THE COURT: Okay.

MR. HART: Moreover let there be no mistake. We are asking that he be sentence[d] as an adult. He is the worse [sic] of the actors in the entire scenario and I intend to offer, I intend to hold a full disposition hearing.

* * * * * *

THE COURT: You want to offer the plea?

MR. LUSBY: Yes your Honor, we are prepared to offer the plea.

The trial court then proceeded to inform Miller of the sentencing consequences for first-degree murder, assault with intent to rob while armed, and felony-firearm. Miller stated that he was pleading guilty freely, understandingly, and voluntarily, and he established the factual basis for the plea. Moreover, at a hearing on February 22, 1991, for the purpose of closing argument the prosecutor made the following remarks while Miller was in the courtroom.

MR. HART: Your Honor, before we get into the substance of the argument, let me just state our position up front and dispel any misunderstanding on what our position on this case is.

On behalf of John D. O'Hair, it is the position of the Wayne County Prosecutor's Office, while there are some circumstances where the mandatory sentencing provisions of the statute might not be appropriate, it is our position that this is not one of those kinds of cases. It is the opinion of the Wayne County Prosecutor's Office that based on the facts and circumstances of this case, justice compels

and demands that this young person be sentenced as an adult and that he be sentenced to life in prison. It is the position of the Wayne County Prosecutor's Office that any sentence less than life in prison would be wholly disproportionate to the seriousness of the crime based on the factual situation and it would be entirely unreasonable in light of this Defendant's part, this Defendant's active participation in the crime.

It is our position that any sentence less than life in prison would be an affront to the integrity of the criminal justice system and an affront to the dignity of Benjamin Gravel and his family, and an affront to the people of this community who rely on the Courts to protect them against marauding, ambushing people who prey upon law-abiding citizens.

In the event that the Court imposes any sentence less than life in prison, it is the opinion of the Wayne County Prosecutor's Office that we will seek immediate review in the higher court to redress what we believe to be the woefully disproportionate leniency of the sentence.

In this case, there can be no doubt that Miller was aware of the sentencing consequences of pleading guilty of first-degree murder. Indeed, in Miller's case, the prosecutor stated on the record in open court that he would appeal if the trial court sentenced Miller to any lesser sentence than as an

adult to life imprisonment without the possibility of parole. Therefore, we conclude that Miller's plea was made knowingly, understandingly, and voluntarily. At the juvenile sentencing hearing, Miller knew that the prosecutor could appeal the sentence, yet he did not move to withdraw his guilty plea until after the appellate process. There is simply no support in the record that Miller did not understand the consequences of pleading guilty of first-degree murder.

The remainder of the trial court's reasons for granting the motion to withdraw the guilty plea are also rejected for essentially the same reasons set forth in Haynes' appeal. There is no record support for Miller's postsentencing allegation that a promise of leniency was made by his counsel. In fact, Lusby testified at the evidentiary hearing that he did not tell Miller that Miller would be sentenced as a juvenile. Rather, Lusby told Miller that his chances were very good that he would be sentenced as a juvenile based on the recommendations of the Department of Social Services, the Probation Department, and the independent psychologist. This advice does not amount to a promise of leniency and does not even constitute bad advice. As noted in Haynes' appeal, counsel's trial strategy in this case worked because Miller was sentenced as a juvenile by the trial court. Therefore, the record does not support the conclusion that Miller was promised leniency by defense counsel or that counsel informed him of incorrect statements of law.

Likewise, Miller's claim of "innocence" is not supported by a review of the entire record. The timing of Miller's claim, some five years after tendering his guilty plea, coupled with the fact that he clearly established a factual basis for the plea, renders his claim of innocence to be implausible.

The trial court's finding that this was merely a credibility determination and that it believed Miller's claim of innocence at the evidentiary hearing is clearly erroneous.

Accordingly, we conclude that Miller's guilty plea was tendered knowingly, voluntarily, and understandingly. There was no error in the plea proceeding to justify setting aside defendant's guilty plea under MCR 6.311. *Montrose, supra,* p. 380, 506 N.W.2d 565. The trial court clearly abused its discretion in granting Miller's motion to withdraw his guilty plea.

Docket No. 190366

Deshawn Lyons (now known as James Edwin Lyons, Jr.), born August 10, 1973, shot and killed Douglas Thomas on November 27, 1989. Lyons pleaded guilty of first-degree murder and felony-firearm. Following a juvenile sentencing hearing, Judge Roberson sentenced Lyons as a juvenile on November 30, 1990. The prosecution appealed that decision, and this Court vacated the sentence and ordered that Lyons be sentenced as an adult. *People v. Lyons,* 195 Mich.App. 248, 489 N.W.2d 218 (1992). In lieu of granting leave to appeal, the Supreme Court vacated this Court's judgment and remanded the case to this Court for reconsideration, finding that Lyons had been denied the effective assistance of appellate counsel. 442 Mich. 895, 502 N.W.2d 41 (1993). On remand, this Court reversed Judge Roberson's decision and remanded for the trial court to sentence Lyons as an adult. *Lyons, supra,* 203 Mich.App. at 467, 513 N.W.2d 170. On September 2, 1994, the Supreme Court denied Lyons leave to appeal. 447 Mich. 959, 530 N.W.2d 478 (1994).

On January 30, 1995, Judge Roberson sentenced Lyons as an adult to the mandatory term of life imprisonment without the possibility of parole. Before being sentenced as an adult, Lyons moved orally to withdraw his guilty plea. On April 5, 1995, Lyons filed a written motion to withdraw his guilty plea. An evidentiary hearing was conducted on April 13, 1995, and, on October 23, 1995, the trial court granted Lyons' motion to withdraw the guilty plea. The prosecution filed an application for leave to appeal, which this Court granted on February 1, 1996.

The parties again dispute whether MCR 6.310(B) or MCR 6.311 applies to this case. For the reasons set forth in Haynes' and Miller's appeals, we find that MCR 6.311 is the correct rule to apply because Lyons was clearly sentenced in this case before he moved to withdraw his guilty plea. Lyons was sentenced on November 30, 1990, as a juvenile. The prior appeals in this case all concern the propriety of sentencing Lyons as a juvenile, and he has at all times been under a sentence. Further, Lyons was sentenced as an adult on January 30, 1995, and it was not until April 5, 1995, that he filed a written motion to withdraw his guilty plea. Accordingly, the trial court erred in applying MCR 6.310(B), and we will apply MCR 6.311.

Lyons pleaded guilty on March 30, 1990. Defendant, defendant's father, defendant's trial counsel, Laurence Burgess, the prosecutor, William Rollstin, and Judge Roberson were all present at the plea hearing. The following colloquy occurred:

> THE COURT: Okay. The defendant was scheduled to go to trial yesterday.

MR. ROLLSTIN: That's correct your Honor it was put over to today because there is another [j]ury trial in Judge Roberts' courtroom.

THE COURT: Counsel?

MR. BURGESS: Larry Burgess appearing on behalf of Mr. Lyons. Judge this is an unusual situation we're about to offer a plea on the first degree murder case.

This as juvenile. I have discussed the matter extensively with both my client who is 16 years old and his father who is present here in the courtroom with him today.

THE COURT: What is the father's name for the record Mr. Burgess?

MR. BURGESS: James Lyons

* * * * * *

MR. BURGESS: After discussing it with him judge I'm convinced that this is in the best interest that I'm convinced I will be able to at the appropriate time at the disposition hearing in this matter convince this court to place Mr. Lyons into the

juvenile system as opposed to the adult system and on the basis of that he wishes to offer plea of guilty at this time judge.

THE COURT: Okay.

MR. ROLLSTIN: Judge the People are objecting to it. The bottom line is Mr. Lyons right now through Judge Carnovale's courtroom was blind drawn to Judge Roberts' courtroom.

That is where the case currently sits right now. The people are prepared to go to trial.

I have all of my witnesses here and the reason that Mr. Lyons is before you is quit[e] obvious in terms of offering a plea of guilty to your Honor instead of Judge Roberts. I believe that what this constitutes is a form of [sic-- forum] shopping and the People are objecting to Deshawn Lyons pleading guilty to the charge before your Honor.

THE COURT: You can't object to him pleading guilty, I'm the chief judge.

All the cases are mine.

MR. ROLLSTIN: But I think that constitutes a form of [sic--forum] shopping and we object.

THE COURT: I'll take the plea over your objection.

I have no objection to it.

The trial court then proceeded to inform Lyons that there were two sentencing options; he could be sentenced as an adult and spend the rest of his life in prison without the possibility of parole or he could be sentenced as a juvenile until his twenty-first birthday. Lyons' father also indicated on the record that he believed that counsel was acting in the best interest of his son. Defendant Lyons indicated that he was satisfied with the services of counsel and he established a factual basis for the plea.

Once again, the record clearly indicates that Lyons was aware that he could be sentenced as an adult to a mandatory term of life imprisonment without the possibility of parole at the time of the plea hearing. Despite knowing this, Lyons pleaded guilty of first-degree murder and did not move to withdraw the plea until after the appellate process. Therefore, the record indicates that Lyons understood the consequences of pleading guilty of first-degree murder and that his plea was knowingly, understandingly, and voluntarily made.

The remainder of the trial court's reasons for granting the motion to withdraw the guilty plea are also rejected for essentially the same reasons set forth in Haynes' and Miller's appeals. First, there is no record support for Lyons' postsentencing claim that a promise of leniency was made by counsel. At the evidentiary hearing, defense counsel stated

that he did not promise Lyons any particular result. Counsel explained his reason for advising Lyons to plead guilty:

> Well, as I saw his case I saw it as a difficult case in terms of defense and potential danger of being convicted. I knew Judge Roberson for many many years and knew the kind of judge he was and the sentencing policies that he had and his sort of general philosophy in handling not so much these kind of cases but cases in general and handling youths. I believed that I could get a fair hearing from Judge Roberson and I believed that I could persuade him to sentence my client as a juvenile so I advised him to do what he did.

As we have noted in Haynes' and Miller's appeals, counsel's trial strategy worked because Lyons was sentenced as a juvenile by the trial court. Therefore, there is simply nothing in the record supporting the trial court's conclusion that counsel promised leniency or informed defendant of incorrect statements of law.

Similarly, Lyons' claim of "innocence" is not supported by a review of the record. The timing of the claim of innocence, after the appellate process and approximately five years after Lyons tendered his guilty plea, coupled with the fact that he clearly established a factual basis for the plea, renders his claim of innocence at this stage implausible. The trial court's finding that this presented a credibility issue and that it believed Lyons' claim of innocence at the evidentiary hearing is clearly erroneous.

Accordingly, we conclude that Lyons' guilty plea was tendered knowingly, voluntarily, and understandingly. There was no error in the plea proceeding to justify setting aside defendant's guilty plea under MCR 6.311. *Montrose, supra,* p. 380, 506 N.W.2d 565. The trial court clearly abused its discretion in granting Lyons' motion to withdraw his guilty plea.

At this juncture, we note our concern with the arguments raised in these appeals regarding the claims of ineffective assistance of counsel. It is clear from the lower court records that the defendants were well aware of the sentencing consequences they faced when they chose to plead guilty of first- degree murder. It is quite ironic, however, that it was the prosecutors who pointed out to the trial court that it would be irresponsible for defense lawyers to plead their clients guilty of first-degree murder because of the sentencing consequences involved. Yet, at no time did Judge Roberson, the defendants, or the defense lawyers appear to be at all concerned that these young defendants were pleading guilty of crimes for which they faced a mandatory sentence of life imprisonment without the possibility of parole. It is apparent that the trial court's decision at this late stage in the game is nothing more than an attempt to evade the clear dictates of this Court and our Supreme Court that these defendants be sentenced to the adult terms of life imprisonment without the possibility of parole. However harsh that punishment may seem as it applies to juvenile offenders, it is for our Legislature to "provide a broader range of sentencing discretion in cases involving automatic waiver of juveniles." *Haynes, supra,* 445 Mich. 855, 519 N.W.2d 842 (1994) (Boyle, J.).

The trial court's orders granting defendants' motions to withdraw their guilty pleas are reversed. There being no basis to reverse these defendants' convictions or sentences, we emphasize that defendants' convictions and sentences of life imprisonment without the possibility of parole as adult offenders are hereby affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Michael D. Schwartz

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 2002

No. 02-803 (2)

DENNIS STRAUB, Warden

Petitioner,

v

CORTEZ MILLER,

Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. WAS THE SIXTH CIRCUIT CORRECT IN AFFIRMING THE DISTRICT COURT'S GRANT OF A WRIT ON THE GROUNDS THAT RESPONDENT'S GUILTY PLEA TO FIRST DEGREE MURDER WAS INVOLUNTARY, UNKNOWING, AND UNINTELLIGENT AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL, WHERE TRIAL COUNSEL ADVISED RESPONDENT TO PLEAD GUILTY TO FIRST DEGREE MURDER BASED UPON COUNSEL'S BELIEF THAT THE JUDGE WOULD SENTENCE RESPONDENT AS A JUVENILE, BUT COMPLETELY FAILED TO CONSIDER AND ADVISE RESPONDENT THAT THE STATE COULD APPEAL THE SENTENCE?

II. DID THE SIXTH CIRCUIT GIVE INSUFFICIENT DEFERENCE TO THE STATE APPELLATE DECISION IN DECIDING THIS CASE?

III. SHOULD THIS COURT RECONSIDER ITS DECISION IN WILLIAMS V TAYLOR REGARDING THE DEFINITION OF UNREASONABLE IN THE AEDPA IN ORDER TO PROVIDE GUIDANCE TO LOWER COURTS?

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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 2002

No. 02-803

DENNIS STRAUB, Warden
Petitioner,
v
CORTEZ MILLER,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT OF THE CASE

Procedural History

Respondent Cortez Miller, who was then fifteen years of age, was charged with first degree murder, assault with intent to commit armed robbery, and felony firearm. He pled guilty as charged on the advice of counsel on March 23, 1990. Because he was a juvenile, the trial court held a statutorily required sentencing hearing on whether he should be sentenced as a juvenile or as an adult. After a lengthy hearing, the trial court sentenced him as a juvenile.

The prosecutor appealed by right, and in a 2-1 opinion, the Court of Appeals reversed and ordered that Miller be sentenced as an adult to life in prison without parole, Murphy J., dissenting. *People v Miller,* 199 Mich App 609 (1993). The Court of Appeals denied Respondent's Motion for Rehearing. The Michigan Supreme Court denied leave, 445 Mich 885 (1994), and denied Respondent's Motion for Rehearing on July 22, 1994.

Prior to resentencing, Respondent filed a Motion to Withdraw his guilty plea. The trial court set an evidentiary hearing on the Motion to Withdraw ***prior to*** imposing sentence. The prosecutor appealed the trial court decision to hold the evidentiary hearing ***before*** the imposition of sentence, and the Court of Appeals denied leave. The prosecutor appealed to the Michigan Supreme Court, and on December 7, 1994, the Court ordered that Respondent be sentenced forthwith, ***but without prejudice to subsequent consideration of the motion to withdraw the plea of guilty*** or motions for other relief which the defendant might pursue. 477 Mich 970 (1994).

On December 17, 1994, the trial court sentenced Miller to life without parole for first degree murder and set the case for an evidentiary hearing on the Motion to Withdraw the guilty plea. The evidentiary hearing was held on May 4, 1995, and the trial court issued a written Opinion on October 23, 1995, granting the Motion.

The Court of Appeals granted leave to the prosecutor and reversed in a published opinion. *People v Haynes, et al*, 221 Mich App 551 (1997). The Michigan Supreme Court denied leave to appeal in an order issued March 6, 1998. 456 Mich 941 (1998).

Respondent filed a petition for writ of habeas corpus under 28 USC 2254 in the United States District Court, Eastern District of Michigan. The District Court granted a writ of habeas corpus on August 31, 2000. Respondent appealed, and the Sixth Circuit affirmed, *Straub v Miller*, 299 F3d 570 (CA6, 2002), and denied Respondent's Petition for Rehearing and Rehearing *En Banc*, on October 2, 2002.

Facts

This case arose out of a shooting death in the course of an armed attempt to steal a car. Respondent Cortez Miller was one of six teenagers at the scene. At the time of the fatal shooting,

Miller and four others were a good distance from the scene, and Miller was running away in fear. Of the other four, two pled guilty as juveniles to second degree murder and were sentenced as juveniles. The other two, who were over seventeen, were tried in Recorder's Court and were acquitted. Miller pled guilty as charged based upon the advice of his court appointed attorney.

His court appointed trial attorney Charles Lusby testified at the evidentiary hearing on the Motion to Withdraw Guilty Plea. Lusby is an experienced criminal defense trial lawyer who does no appellate work. He characterized his advice to Miller to plead guilty to first degree murder as "extraordinary." He gave that advice to Miller because he believed "very strongly" that the trial court would sentence him as a juvenile: "I felt it very strongly because I would not have considered asking a child at that time to plead guilty to murder one."

Lusby said that in formulating his advice to his client he did ***not at all*** consider that the prosecutor had the right to appeal the trial court decision on the sentence and did not discuss that with his client. Lusby believed there was no defense. [1] Lusby said that Miller was "totally reliant" upon his advice. Miller and his parents were reluctant for him to plead guilty to first degree murder because of the mandatory life sentence, but Lusby first convinced Miller's parents that it was the right thing to do and then finally Miller himself. *Id.*

Lusby recalled that the trial prosecutor had said in closing argument, at the ***conclusion*** of the sentencing hearing, that if an adult sentence was not imposed, the prosecutor would appeal. Lusby said Miller expressed concern when that comment was made, but Lusby downplayed the concern and

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[1] Lusby was wrong. There were theories of defense available which could have led to a finding of guilt on an offense lesser than first degree murder, if not acquittal, including a lack of shared intent with the principal, which is a question of fact under Michigan law. *People v Trudeau*, 51 Mich App 766 (1974).

told Miller not to worry, and they did not discuss it further. The prosecutor's comment was made in closing argument almost a year after the guilty plea and after six days of lengthy testimony spread over that year.

Cortez Miller testified that at the time of his arrest he was fifteen years old and was in the ninth grade, a year behind in school. He said that Lusby advised him to plead guilty because he thought his chances at trial were slim. Miller believed that he would go the Boys Training School if he pled guilty. *Id.* He said that while Lusby did not guarantee him what the sentence would be, it was his understanding from his discussions with his lawyer that if he pled guilty he would go to the Training School. Miller said that the brief factual basis presented at the time of the plea was an incomplete statement of what he did and intended. Miller said that he would not have pled guilty had he been aware that the trial court's sentencing decision was not final and that the prosecutor had the right to appeal and the decision could be reversed.

At the time of the shooting, Miller said he was running away from the scene in fear and was out of sight when the fatal shots were fired. He said he had not left the company of his five co-defendants before then, because he did not want to seem like a coward. He had no desire to participate in a robbery and did not anticipate that anyone would be shot. He admitted that he had given his grandfather's pistol, which fired the fatal shot, to a co-defendant when asked for it, but said he did so because he was scared and really did not want the gun because he was not used to having one.

In its Opinion granting the Motion to Withdraw the guilty plea, the trial court found that the plea was not knowing, intelligent, involuntary, and that Miller was deprived of the effective assistance of counsel. The Court found that Miller was totally reliant upon the advice of his attorney

that the trial court would sentence him as a juvenile, and that counsel's advice was defective, because counsel (1) failed to take into consideration that and (2) failed to tell Miller that the prosecutor could appeal and an appellate court could reverse the trial court's decision. The trial court found that Miller's plea was not knowing, intelligent, and voluntary, because (1) given his youth he was highly reliant upon his attorney's advice regarding the result if he pled guilty, and his attorney minimized the risk of an adult prison sentence; and (2) he had a potential defense to the charge of first degree murder and claimed innocence from the elements of the offense, in that he had a claim of self-defense or of mitigation, i.e., he might be guilty of a lesser degree of homicide. The court noted that the state did not claim it would be prejudiced if the plea were withdrawn. The Court concluded it was in the interests of justice to permit Miller to withdraw his guilty plea and go to trial. *Id.*

The prosecutor appealed, and the Michigan Court of Appeals reversed. *People v Miller,* 221 Mich App 551 (1997). The Court said the plea was voluntary and that Miller was not denied the effective assistance of counsel where he was not aware that he was taking a risk beyond the discretion of the trial court on sentencing, because Miller was aware when he pled guilty that life without parole was a possibility (and therefore it did not matter whether he received that sentence from the trial court or from the Court of Appeals).

In granting a writ of habeas corpus, the District Court found that the Michigan Court of Appeals decision was an unreasonable application of *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed2d 674 (1984) and *Hill v Lockhart*, 474 US 52, 106 S Ct 366, 88 L Ed2d 203 (1985), under *Williams v Taylor*, 529 US 362, 120 S Ct 1495, 146 LEd2d 389 (2000). The Court found that the failure of trial counsel to ***consider and discuss*** with Respondent that the state could appeal a juvenile sentence by right deprived Respondent of the effective assistance of counsel and

rendered the guilty plea involuntary. The District Court noted that while the Michigan Court of Appeals placed great emphasis on the fact that the prosecutor stated at the outset of his closing argument at the end of the sentencing hearings that he would appeal if a juvenile sentence were imposed, the Court completely ignored Lusby's testimony that Miller expressed concern when the prosecutor made that statement and Lusby downplayed it and told Miller not to worry about it, and there was no further discussion about that even after the trial court sentenced Miller as a juvenile. The District Court found that in light of the fact that Miller's attorney told him not to worry about it, it was unreasonable for the Court of Appeals to expect the teenaged Respondent to move to withdraw his guilty plea on his own at sentencing. The Court noted that the Michigan Court of Appeals had ignored Respondent's heavy reliance on his attorney, given his age and educational level, in finding the plea voluntary, particularly when defense counsel rendered such "extraordinary advice" as to plead guilty to first degree murder. The Court also found that Respondent was prejudiced, because Respondent showed a reasonable probability that he would not have pled guilty had he known there was another level of risk in a prosecution appeal.

The Sixth Circuit affirmed, finding that counsel's failure to consider the risk of a state appeal of the sentence and failure to advise Respondent of that risk constituted deficient performance under *Strickland*, and that Respondent was prejudiced under *Hill*, because there was a reasonable probability he would have chosen to go to trial had he been aware that there was a second level of risk beyond the sentencing decision of the trial court.

ARGUMENT

I. RESPONDENT'S GUILTY PLEA TO FIRST DEGREE MURDER WAS INVOLUNTARY, UNKNOWING, AND UNINTELLIGENT AS A RESULT OF THE INEFFECTIVE ASSISTANCE OF COUNSEL.

Respondent maintains the Sixth Circuit was correct in ruling that his guilty plea was not voluntarily, knowingly and understandingly made, because he was denied the effective assistance of counsel. US Const, Ams V, VI, XIV. In its petition, the state attempts to recast the District Court and Sixth Circuit opinions and raises a claim that was not raised until the appeal to the Sixth Circuit. Contrary to the state's claim, the Sixth Circuit decision does not create a "new rule" under the AEDPA, but simply applies *Strickland v Washington* and *Hill v Lockhart*.[2] The state's argument, based primarily upon the dissenting opinion in the Sixth Circuit, is essentially that the Sixth Circuit majority was wrong. It does not merit a writ of *certiorari*.

The state attempts to recast the issue here as merely one of the failure to advise Respondent

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[2] See *Sellan v Kuhlman*, 261 F3d 303, 309 (CA2, 2001), the Court said:

In some circumstances, the question of precisely what law must be "clearly established" for AEDPA purposes may prove to be a complex one. *Cf. Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 254 (2d Cir.2001) (describing the "recurring difficulty" of determining whether a federal right is "clearly established" for qualified immunity purposes). No such complexity exists here. In *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), a post-AEDPA ineffective assistance of counsel case decided after the district court filed its opinion, the Supreme Court concluded: "It is past question that the rule set forth in *Strickland [v. Washington*] qualifies as clearly established law, as determined by the Supreme Court of the United States." Id. at 391, 120 S.Ct. 1495 (Stevens, J., for the Court, Part III) (internal quotation marks omitted). ***The Williams Court thus clarified that for AEDPA purposes, it matters only that the Strickland performance and prejudice test has been "clearly established"—not that a particular theory of ineffective assistance derived from Strickland has been clearly established.*** Any case-specific concerns "obviate neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." Id. (Emphasis added.)